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To
Dean Harris
from
John McKeown
St. Catharines,
22d March 1893

THE MARRIAGE PROCESS

IN THE

UNITED STATES.

BY

Sebastian Bach

Rev. S. B. SMITH, D.D., 1845

AUTHOR OF "ELEMENTS OF ECCLESIASTICAL LAW," "THE NEW PROCEDURE,"
"COMPENDIUM JURIS CANONICI," ETC., ETC.

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LETTER FROM THE CENSOR APPOINTED BY HIS GRACE THE MOST REV. M. A. CORRIGAN, D.D., ARCHBISHOP OF NEW YORK.

REV. DEAR DOCTOR:

I have read with great attention and no less satisfaction the proof-sheets of your new book, "The Marriage Process." At every page I have had occasion to notice evidences of your perfect acquaintance with this intricate and delicate subject, also of sound criticism, patient research, and judicious perusal of the latest and most authorized publications on the matter. I do not hesitate to state that your book contains a clear, complete, and learned exposition of the marriage process. The opportuneness and practical necessity of such a treatise need not be shown. All interested in this important matter will undoubtedly appreciate and welcome your work.

Sincerely yours in Christ,

RÉMY LAFORT.

ST. JOSEPH'S PROV. SEMINARY,
TROY, N. Y., December 23, 1892.

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PREFACE.

THE subject of these pages—the marriage process—is comparatively new in this country. Down to the year 1884, marriage disputes, even those involving the validity of marriages already contracted, were, as a rule, decided, with us, by the bishop, or also by rectors of parishes, and sometimes even by assistant priests, without any judicial formalities whatever.

This mode of procedure was naturally open to serious inconveniences, and was calculated to imperil, in many cases, the stability and indissolubility of marriages.

To obviate these disadvantages, the S. C. de Prop. Fide, in 1884, issued the Instruction *Causae Matrimoniales* for this country. This Instruction or law substantially lays down and makes obligatory here, in matrimonial contentions involving the validity of a marriage contracted, the manner of proceeding which is prescribed by the general law of the Church and obtains throughout the entire Church. This mode of deciding marriage disputes is judicial, and is to be conducted by the bishop's court for marriage causes.

In some respects the judicial formalities of the marriage process are the same as those of other ecclesiastical trials. But in no small number of points there are wide divergencies between the two. From the very nature of the subject-matter in dispute, the marriage trial has many peculiarities, and is frequently more intricate and complex than other ecclesiastical trials.

It is for this reason that we have thought it opportune to explain in these pages the marriage process, with all its peculiar features. In order to do this more successfully, we have also considered it proper to set forth briefly the nature and essential elements of marriage; the various causes, impediments, or disabilities which annul a marriage; the right to adjudicate upon the validity of marriages contracted; the persons in whom this right is vested; etc.

It is needless to dwell upon the paramount importance and the practical utility of the subject discussed in this volume. Marriage is the primary and most important of the domestic relations. It has its foundation in nature, was instituted by God Himself in paradise, and is the only lawful relation by which divine Providence has permitted the continuance of the human race. It is one of the chief foundations of social order. We may justly place to its credit a great share of the blessings, temporal and spiritual, enjoyed by mankind. Its beneficent influences are chiefly due to its stability, unity, and indissolubility. The stability and sanctity of marriage require that valid marriages shall be protected against wanton and malicious attacks, and that invalid ones shall be either rendered valid or juridically declared invalid. To accomplish these ends is the aim of the procedure outlined in this work.

S. B. SMITH.

PATERSON, N. J., January 2, 1893.

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THE MARRIAGE PROCESS.

GENERAL OUTLINE OF THE BOOK.

1. *What is an ecclesiastical trial?*—We speak in this treatise, it is needless to say, only of the *ecclesiastical*, not of the *secular*, process or trial, in matrimonial contentions. Now, an ecclesiastical trial or judicial process, in its broadest sense, is the legitimate hearing and decision, by a competent ecclesiastical judge, of a matter or fact which is being disputed between two parties, called respectively plaintiff and defendant.[1] Wherefore, in every trial, three things are absolutely required: (*a*) a competent judge; (*b*) a matter or fact in dispute; (*c*) a lawful hearing of all the parties interested, and the decision of the judge.

2. *Various kinds of ecclesiastical trials.*—By reason of the different kinds of matters in dispute, ecclesiastical trials are divided into two kinds: (*a*) *criminal* (*processus criminalis*), that is, those where crimes are punished; (*b*) *civil* (*processus civilis*), or those where other controverted matters are to be decided. The civil process is principally subdivided, by reason of the different classes of civil matters in dispute, into 1° *beneficial* (*processus beneficialis*), or those where disputes relating to ecclesiastical offices or benefices are discussed and decided; 2° *matrimonial* (*processus matrimonialis*), namely, those where controverted matters concerning marriages are heard and decided.

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[1] Nostrum Comp. Juris Can. n. 1009.

3. *The matrimonial trial.*—What then, in particular, is a matrimonial trial? It is the legitimate hearing and decision, by a competent judge, of a controverted matter or fact concerning a marriage, according to the formalities prescribed by the law of the Church. We say, *a controverted matter or fact concerning a marriage.* Now, matters or facts relating to marriages, as the subject of dispute, are chiefly of the following kinds: 1° those which refer to the *promise* of marriage (*sponsalia*—from *spondere*, to promise), v.g., the existence, validity, and effects of engagements; 2° those which relate to the marriage itself as *about to be contracted*, v.g., whether the parties are free from impediments; 3° those which regard marriages *as already contracted*, v.g., whether they are invalid by reason of a diriment impediment; 4° those which concern the *intrinsic* and *essential* effects or obligations flowing from marriages already contracted, v.g., the separation from bed and board; 5° those which have reference to the *extrinsic* and *accidental* effects or consequences of marriages, v.g., questions of property, dower, inheritance, donations. These are called *civil* effects, because they relate wholly to the civil or social life of the married couple, and do not flow necessarily from marriage itself. Formerly the civil effects were also subject to the Church, because of their being connected with marriage. But at present they belong to the civil power.

4. *Obligation of the trial.*—Here it is to be observed that the trial or judicial process proper, v.g., as prescribed by the S. C. de P. F. Instr. *Causæ matrimoniales*, 1884, is obligatory only where there is question of the validity or nullity of marriages *already contracted.* In the other cases, no process or trial, in the strict sense, is made use of, with us, and in fact almost nowhere at present. Hence we shall, in this book, speak solely of the process in the cases where the validity of a marriage already contracted is contested.

5. *Competent judge.*—We have also said in the definition of the matrimonial process, *by a competent judge.* By a competent judge we mean one who has the power and right to hear both sides, and to decide the dispute in such a manner that they will be bound to abide by his decision, unless it is reversed by the legitimate superior.

6. *Formalities.*—Finally we have said, *according to the formalities prescribed by the law of the Church.* These formalities, which are to be observed in the hearing and deciding of contentions relating to marriages, constitute the trial or process, properly so called.[1]

7. *Plan of the work.*—From what has been said, it will be seen that the questions to be treated in this work are: 1° Who is the competent judge? 2° What is the matter of the trial? 3° What are the formalities to be observed? All these questions will be treated only with reference to the contested validity of marriages *already* contracted. For, as we have already observed, the trial proper, as prescribed by the Instr. *Causae matrimoniales* of the S. C. de P. F., is obligatory only in the case of marriages already contracted, but not in the case of marriages ABOUT *to be contracted.*

8. In order to ascertain who is the competent judge, it is necessary first to examine what marriage is, and that among Catholics, non-Catholic Christians, and infidels.

9. In regard to the matter of the process, it will be seen that it consists of the diriment impediments. For they alone are the annulling cause of a marriage already contracted.

10. Finally, the formalities of the trial proper are, in the main, the same as in other trials. We say *in the main*; for there are quite a number of differences, which follow from the difference of the matter tried.

We shall therefore divide this book into three parts. The *first* will treat of the nature and essential characteristics of marriage, and of the competent judge in marriage contentions. The *second part* will treat of the diriment impediments. The *third* will describe the process itself, or the various formalities in which the proceedings are conducted.

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[1] Schulte, Eheprocess, p. 1.

PART I.

NATURE OF MARRIAGE AND COMPETENCE IN MARRIAGE CAUSES.

11. We shall first give a true idea of marriage, as anterior to our Blessed Saviour; then as reformed and ennobled by Him. Next we shall apply the truths and principles laid down, to the marriages of Catholics, of heretics, and of unbaptized persons. Finally we shall see, from the principles evolved, who has the right and jurisdiction to hear and decide matrimonial causes.

CHAPTER I.

MARRIAGE, ITS NATURE AND ESSENTIAL ELEMENTS.

ART. I.

MARRIAGE IN ITSELF.

12. Q. What is marriage in itself, as it existed prior to Our Saviour, and still exists among unbaptized persons?

A. It is, by its very nature and origin, "a contract between a man and a woman, by which they mutually bind themselves indissolubly to live together in common, for the purpose of bringing forth and educating children, and for mutual assistance."[1] We say *a man and a woman;* that is, between one man and one woman, in order to exclude polygamy. For, as we shall see, marriage is and always was, by its very nature, and also by God's positive will, *monogamous.* We say *indissolubly;* that is, for life. We say, *a contract;* that is, a free consent on the part of a man and a woman to live together as husband and wife.

13. Q. By whom and how was marriage instituted?

A. By God Himself in paradise, and that as an indissoluble marital or sexual union between one man and one woman, entered into by the free consent of both.[2] Marriage is therefore by God's immediate appointment indissoluble and monogamous,[3] and consequently is and always was, by divine law, even among infidels, that is, unbaptized persons, indissoluble and monogamous.[4]

14. Q. What is the nature of the contract in marriage?

A. The contract, agreement, or free consent is the very foundation and cornerstone of marriage. By the nature of marriage and by God's appointment, this consent must be free. In other words, the parties must be perfectly free in entering upon the marital union. But once they have entered upon this union, they are no longer free to dissolve it.[5] For, as we have seen, the marriage even of infidels is a union instituted and regulated by God Himself, from the very beginning. Marriage, therefore, even among non-baptized persons, is not merely a *civil contract,* like any other civil or social agreement by which men regulate their temporal concerns. On the contrary, it is rather a *natural* and *divine* contract, because it is, in its essential elements, regulated by and subject to the law of God and of nature.[6]

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[1] Soglia-Vecchiotti, vol. iii. p. 108.

[2] Gen. i. 27, 28; ii. 18, 23, 44. Conc. Trid. sess. 24, Doctrina de Sacr. matr.

[3] Card. Kutschker, Canon Law of Marriage, vol. i. pp. 11, 12, 28.

[4] Leo XIII., Const. *Arcanum,* 10 Febr. 1880, § *Constat.*

[5] Heiss, de Matr. p. 7.

[6] Kutschker, l. c. p. 13.

Thus Pope Leo XIII., in his Encyclical *Arcanum*, says: "Igitur cum matrimonium *sit sua vi, sua natura, sua sponte* sacrum," etc.

ART. II.

MARRIAGE AS ENNOBLED BY OUR LORD.

15. As we have seen, marriage was instituted by God as indissoluble and monogamous. But in the course of time, owing to the wickedness of men, it degenerated in such a manner that it scarcely retained any of its essential characteristics.[1] Even among the Jews, it was allowed, by divine dispensation, to have a plurality of wives, and to break the marriage bond, in certain contingencies.[2]

16. Christ our Saviour not only restored marriage, as instituted by God in paradise, to its original unity and indissolubility, but moreover made it one of the seven sacraments of the New Law. The Council of Trent[3] defines: "Si quis dixerit, matrimonium non esse vere et proprie unum ex septem legis evangelicae sacramentis a Christo Domino institutum . . . anathema sit."[4] In other words, Our Lord ennobled and perfected marriage by making the marital union or contract a means *ex opere operato* of grace.

17. Thus it will be seen that Our Saviour did not change the nature or substantial elements of marriage, as instituted by God in paradise, but simply made it the efficacious means of grace. In other words, He made the contract or agreement by which a man and a woman indissolubly and freely agree to be man and wife a means or sign which produces grace in the married couple *ex opere operato.* Hence marriage *as a sacrament* may be defined: "a contract between a man and a woman, by which they freely bind

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[1] Heiss, de Matr. p. 8.

[2] Matt. xix. 8.

[3] Sess. 24, can. 1, de Matr.; cf. Matt. v., xix. 8 sq.; Ephes. v. 25 sq.

[4] Leo XIII., Const. *Arcanum*, § *Sed tot.*

themselves indissolubly to live together in common, for the purpose of bringing forth and properly educating children, and of giving each other assistance, which contract confers upon the married couple grace *ex opere operato.*"

18. Thus it is apparent that the marital contract itself, or the free consent, externally manifested, is the *matter* of the sacrament; and that the words or signs in which this free consent is made known is its *form.*[1] Marriage, therefore, as a sacrament is simply a perfection of marriage as instituted by God in paradise.

ART. III.

THE MARRIAGE OF CATHOLICS.

19. Baptism is the door, the *sine qua non,* of all the other sacraments. Consequently, only baptized persons are capable of receiving the sacrament of marriage. But it is asked: Do Catholics, when they get married, always necessarily receive the sacrament of marriage; or is the marriage of Catholics always necessarily a sacrament? We answer, Yes. This can be no longer doubted, at the present day. Thus Pope Pius IX., in an Allocution to the College of Cardinals made Sept. 27, 1852, says:[2] "Cum nemo ex Catholicis ignoret aut ignorare possit, matrimonium esse vere et proprie unum ex septem evangelicae legis sacramentis a Christo Domino institutum, ac propterea *inter fideles matrimonium dari non posse, quin uno eodemque tempore sit sacramentum,* atque idcirco quamlibet aliam inter Christianos viri et mulieris, praeter sacramentum, conjunctionem cujuscumque etiam civilis legis vi factam, nihil aliud esse nisi turpem atque exitialem concubinatum ab ecclesia tantopere damnatum *ac proinde a conjugali foedere sacramentum separari* numquam posse, et omnino spectare ad ecclesiae

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[1] Card. Kutschker, l. c. vol. i. p. 25.

[2] Apud Kutschker, l. c. p. 30.

potestatem, ea omnia decernere, quae ad idem matrimonium quovis modo possunt pertinere."

20. The reason is that, as we have seen, the marital consent or the mutual agreement to be husband and wife, as given by baptized persons, is the matter and form of the sacrament of marriage. Hence, when Christians or Catholics give their marital consent, that consent or contract or agreement becomes, *ipso facto*, the very moment it is being given, the means of grace *ex opere operato*, or the matter and form of the sacrament. Catholics, therefore, cannot contract marriage without at the same time receiving the sacrament of matrimony. Among them the marriage contract and the sacrament are one and the same thing, in concrete, though distinguishable in the abstract. Hence the two are inseparable.[1]

Pope Leo XIII., in his admirable Encyclical *Arcanum*, § *Nec quemquam*, says: "Cum exploratum sit in matrimonio Christiano contractum a sacramento non esse dissociabilem; atque ideo non posse contractum verum et legitimum consistere, quin sit eo ipso sacramentum. Nam Christus Dominus dignitate sacramenti auxit matrimonium: matrimonium autem est ipse contractus, si modo sit factus jure."

21. We may illustrate this by a familiar comparison. People daily agree with each other to sell a piece of land together with the houses on it. They express their consent to the sale, in a paper drawn up for that purpose and called a deed; yet this agreement of theirs is of no legal force whatever until the deed is made out according to the forms required by law and is, moreover, filed and registered in the county clerk's office. In this case, the legal formalities do not change anything in the contract of sale; they simply strengthen it and give it legal effect. Yet they form an essential part of the contract. For without them the con-

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[1] Perrone, de Matr. Christ., vol. i. p. 165 sq.

tract is invalid and of no effect. Hence the formalities and the contract are inseparable.[1] Of course, like every other comparison, this one does not fully illustrate the inseparability and concrete identity of the marital contract and of the sacrament among the faithful.

ART. IV.

THE MARRIAGE OF PROTESTANTS.

22. It is necessary to distinguish between two classes of non-Catholics: 1° those who have not received baptism; 2° those who have received baptism validly, and thus become members of the true Church, though they are outside of her pale. The first class is called *unbelievers*, *infidels*, and comprises Jews, pagans, and all others who are not baptized; the second includes Protestants or heretics, and schismatics. We shall speak first of the marriage of Protestants, then of that of infidels.

23. Q. Is the marriage of Protestants a sacrament, like that of Catholics?

A. The marriages of Protestants, that is, of persons who belong to sects separated from the Catholic Church, and who are validly baptized, are always necessarily sacraments, just like the marriages of Catholics. In other words, when Protestants marry, their marital contract, agreement, or consent becomes, *eo ipso*, the matter and form of the sacrament of marriage, just as in the case of Catholics.

24. The reason is plain. There is and can be only one true Church, namely, the Catholic Church. Baptism, if validly administered, no matter by whom, is a sacrament which makes us Christians, that is, members of the one true Church. Hence all who are validly baptized, no matter to what sect they belong, become, by that very fact, members

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[1] Perrone, l. c. p. 170.

of the Catholic Church—the only true Church, the mystical body of Christ. St. Augustine[1] writes: "Videntur sibi argutissime quaerere, utrum generet filios baptismus Christi in parte Donati, an non generet? Ut si consenserimus, quod generet (baptismus a Donatistis collatus), suam esse asseverent ecclesiam matrem, quae filios potuit de Christi baptismate generare; et quia unam oportet esse ecclesiam, ex hoc jam nostram (Catholicam) non esse ecclesiam criminentur. Si autem dixerimus, non generat; cur ergo, aiunt, apud vos non renascuntur per baptismum, qui transeunt a nobis ad vos, cum apud nos fuerint baptizati, si nondum nati sunt? Quasi vero ex hoc generet, unde separata est, et non ex hoc, unde conjuncta est. Separata est enim a vinculo charitatis et pacis, sed juncta est in uno baptismate. Itaque est una ecclesia, quae sola Catholica nominatur, et quidquid suum habet in communionibus diversorum a sua unitate separatis, per hoc quod suum in eis habet, ipsa (Ecclesia Catholica) utique generat, non illae; quod et si hoc dimittant, omnino non generant."[2]

25. The spiritual birth therefore of baptism, even though conferred out of the true Church, incorporates the recipient into the true Church, just as the natural birth makes a person a member of the society where he is born. Now the character impressed by baptism is indelible. Consequently those who are baptized remain forever, *de jure*, members of the true Church, though as a matter of fact they are in rebellion against her, and outside of her pale. Now, by our divine Lord's institution, marriage is always a sacrament among those who belong to His Church by baptism, even though they are in rebellion against her.

Scavini states this clearly, as follows: "Haeretici et schismatici, qui ineundo matrimonium leges ecclesiae accurate servant, valide contrahunt, et *sacramento* muniuntur, cum nihil sit, quod *valori hujus sacramenti* obstare possit. Hoc confirmat praxis ecclesiae, quae nullimode eos adigit sive ad renovandum consensum sive ad benedictionem nuptialem recipiendam, si resipiscentes ad Catholicae Ecclesiae unitatem redeunt."[1]

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[1] Lib. I. de bapt. contra Donat. cap. 10.

[2] Cf. Kutschker, vol. i. p. 443.

26. Q. Does the above apply to *all* Protestants who are baptized?

A. It applies to all outside of the Church *who are validly baptized*, but not to those who are invalidly baptized. The reason is that an invalid baptism is no baptism at all, and consequently persons who are invalidly baptized are on the same level with Jews, pagans, and infidels, who are not baptized at all. The question therefore occurs, what Protestants are considered validly baptized? It is superfluous here to remark that baptism may be and is validly administered by any one,[2] even though a Jew or a pagan, provided he uses the proper matter and form, and have the general intention of doing what the Church does.[3] But it is also true that, especially at the present day and in this country, some of the Protestant sects do not baptize at all, others use the wrong matter and form, and others finally, though having the right matter and form, are very careless in using them.

27. Q. What rules, then, are to be followed in ascertaining whether the baptisms of Protestants are valid or not, in order to marriage?

A. The Holy See has laid down the following rules: 1° As to heretics belonging to sects, whose rituals prescribe the administration of Baptism without the necessary use of the essential matter and form, each particular case should be examined. If it is found that the proper matter and form have not been used, the baptism is of course to be considered as certainly invalid. But if this remains doubtful, the baptism is to be regarded as valid, in order to the validity of the marriage.

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[1] Apud Kutschker, vol. i. p. 443.

[2] Conc. Trid., sess. 7, can. 4, 7, 8, 11, de bapt.

[3] Card. Franzelin, de Sacr. in genere, p. 206.

2° As to other heretics, who baptize validly according to the ritual of their sect, the baptism is to be considered valid, even if a doubt remains as to whether the baptism was validly administered.

3° Where it is certainly known, from the actual practice or custom of a sect, that baptism is invalidly administered in it, such baptism must of course be regarded as invalid.

28. Consequently the baptism of Protestants is to be regarded as valid (*a*) where it is found that the proper matter and form have been really used; (*b*) where it is *presumed* that they have been used, v.g., where the ritual prescribes the right matter and form, or where it is the usage or custom of the sect to use them. Of course this presumption may be overcome in a particular case, by the real facts showing that the right matter and form were not used. It is also to be observed here that very often, at the present day, especially in this country, Protestant parents fail to have their children baptized at all.[1]

29. Q. What is the custom and rule of the various Protestant sects, especially with us, concerning baptism?

A. 1° Some sects, sprung from Protestantism, do not baptize at all. These sects are the Socinians and Quakers. 2° Baptists receive baptism only when they have become adults. 3° Congregationalists, Unitarians, and Universalists do not consider baptism necessary. 4° Presbyterian and Methodist ministers confer baptism by dipping their fingers or the sprinkle in water and sprinkling with it those who are to be baptized, often in such a manner that the water scarcely touches them. 5° Episcopalians, Lutherans, and Ritualists baptize validly according to their ritual,[2] though, especially at the present day, they are frequently careless in the use of the proper matter and form.

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[1] Decretum 17 Sept., 1830 in the Baltimore Ritual, p. 544.

[2] Konings, Mor. n. 1264; Sabetti, Mor. n. 662, Q. 6.

30. From this it will be seen that, in very many cases, the validity of the baptism of Protestants will remain doubtful. Now, in this case, according to the rule laid down by the Holy See, the baptism must be presumed as valid, in order to the marriage. And, in reality, when the *fact* of the baptism having been administered is certain, then the presumption is that it was administered validly. Hence it is to be regarded as valid, in order to the marriage, until the contrary is clearly and fully proved.

Art. V.

THE MARRIAGE OF INFIDELS.

31. By infidels are here meant (*a*) all persons who have never received baptism, namely, Jews, Turks, pagans, and other persons who were never baptized; (*b*) all those Protestants who have indeed been baptized, but whose baptism is clearly and certainly invalid.

32. Q. What is the nature of the marriage of unbaptized persons among each other?

A. As we have seen, baptism is the *sine qua non* of all the other sacraments. Without it no other sacrament can be validly received. Consequently the marriage of unbaptized persons is not a sacrament. Hence the marriages of infidels and of all other unbaptized persons are, at present, to be regarded in the same light as were marriages before the institution of marriage as a sacrament by our Blessed Saviour. In other words, the marriages of unbaptized persons, among themselves—v.g., of a Jew with a Jew, of a pagan with a pagan—are at present what they were before the time of Our Lord. They are, consequently, true marriages (*matrimonium verum*); they are also, as we have seen

(n. 12), monogamous and indissoluble, both by natural and divine positive law.[1]

33. Yet the marriage of infidels among themselves, owing to its not being a sacrament, does not possess the perfection and prerogatives of the Christian marriage. For the latter is not only a true and legitimate (*matrimonium verum et legitimum*), but moreover an absolutely unalterable marriage (*matrimonium ratum*); while the former, although true and legitimate, is not *ratum*, that is, not absolutely unalterable, or incapable of being dissolved.[2] Thus Pope Innocent III. expressly teaches: "Nam etsi matrimonium verum inter infideles existat, non tamen est ratum; inter fideles autem, verum et ratum existit, quia sacramentum fidei, quod semel est admissum, nunquam amittitur, sed ratum efficit conjugii sacramentum, ut ipsum in conjugibus illo durante, perduret."[3]

34. Here the Pontiff, in clear terms, says that the marriage of infidels (both spouses being unbaptized) is a true marriage, but yet not *confirmed* or absolutely unalterable (*non ratum*, i.e., *non confirmatum*); but that among the faithful, or those who are baptized, the baptism, impressing as it does a mark upon the soul which remains *forever*, makes the marriage not only a true one, but also one that is unalterable (*ratum*) or indissoluble as long as each of the spouses lives.

When and how the marriages of infidels can be dissolved we shall see below.

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[1] Bened. XIV. De Syn. l. 13. c. 22, n. 3. . . Schulte, Eherecht, p. 225.

[2] Kutschker, l. c. vol. i. pp. 366, 367.

[3] Cap. 7 de Divortiis (iv. 19).

CHAPTER II.

COMPETENCE IN MATRIMONIAL CAUSES.

35. By competence in matrimonial causes is meant the power and jurisdiction to hear and decide authoritatively disputed matters relating to marriages. We shall examine first who is, in general, the competent judge, or which is the competent forum; next, what judge is competent, in particular, that is, in a given case.

Art. I.

COMPETENCE IN GENERAL.

36. We shall speak of competence in relation to the marriage (*a*) of Catholics; (*b*) of Protestants; (*c*) of infidels or unbaptized persons.

§ 1. *Competence in Relation to the Marriage of Catholics.*

We shall speak first of the competence of the Church, and then of the State.

I.

Competence of the Church.

37. Q. In whom, speaking in general, is vested the right and power to adjudicate matrimonial causes among Catholics?

A. The answer is not difficult. The marriage of Catholics, and of all baptized persons, is always necessarily a sacrament, as we have seen. In other words, the contract to be husband and wife becomes, among Christians, always the means of grace *ex opere operato.* Their marital contract, though distinguishable from the sacrament, in the abstract, is yet, in the concrete, one and the same thing. Now the Church alone has power in all that pertains to the sacraments. They are essentially spiritual things, and therefore fall within the realm of the Church, not of the State. Consequently all that relates to the essential elements, that is, to the matter and form of the marriage among Christians, comes within the jurisdiction of the Church and of the ecclesiastical judge, and not of the secular.

Thus the S. C. de P. F.[1] says: "Causae matrimoniales ad judicem ecclesiasticum spectant, cui soli competit de validitate matrimonii et obligationibus ex eadem derivantibus sententiam ferre."

38. From this it follows that all controversies relating to the validity of a marriage as contracted among Catholics fall under the Church's jurisdiction. It follows also that she alone has power to make diriment impediments, or conditions upon which will depend the validity of the marriage. It follows moreover that she alone has power to decide (*a*) whether an engagement is valid or not; (*b*) whether the parties about to get married are free from impediments or not; (*c*) whether a marriage already contracted is, in a given case, invalid by reason of an impediment; (*d*) whether the separation from bed and board shall be allowed; etc.

39. Of course, Catholics, besides being bound by the impediments enacted by the positive law of the Church, are also bound by the impediments which are established by the natural law and the divine positive law.

40. Q. May Catholics, also in this country, have recourse, at times, to the secular courts, in order to obtain a divorce, either *a vinculo* or only *a mensa et thoro?*

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[1] Instr. *Causae Matrimoniales,* 1884, § 1.

A. We have already shown that Catholics cannot recognize in the civil power any jurisdiction in matters relating to the validity of their marriages, or the essential obligations flowing from them. Hence they cannot take any action which would imply a recognition of such power in the State. Consequently they cannot, *per se*, apply to the secular courts for a divorce, whether absolute or only partial. For them, the Church alone has the power to grant either.

41. But in this country, as in many other countries, the State recognizes only those divorces which are granted by itself or by the secular courts, not those granted by the ecclesiastical. Hence Catholics, like all other citizens, if they wish to safeguard property rights, etc., can do so, in certain contingencies, only by having recourse to the secular courts for a divorce. Or again, Catholics whose marriage is declared invalid by the ecclesiastical tribunal, and who marry again without having obtained a divorce *a vinculo*, or the annulment of their previous marriage, from the secular courts, would be liable to arrest and punishment for bigamy and adultery.

42. Hence the very practical question presents itself: Can a married couple, who are Catholics, ever apply to the secular courts for an absolute divorce, that is, for a total annulment of their marriage? Can a Catholic judge grant it? Can a Catholic lawyer undertake the obtaining of it? Two cases are to be distinguished.[1] The *first* is (*a*) where the marriage has been contracted *invalidly*, that is, with a diriment impediment, and has been juridically declared invalid by the proper ecclesiastical tribunal; (*b*) or where a *matrimonium ratum et non consummatum* has been dissolved either by a dispensation from the Supreme Pontiff, or by the solemn religious profession of one of the spouses. There

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[1] Our Notes on the II. Pl. C. Balt., etc., n. 287.

is no doubt that, in all these circumstances, the parties can apply to the secular courts for an absolute divorce or annulment of their marriage. For, by such divorce, they simply regain before the secular law the liberty from the bond of their marriage which they already possess before God and the Church. Of course, in this case, a Catholic lawyer can plead for, and a Catholic judge can grant, the divorce.

43. The *second* case is, where the marriage is *valid* before God and the Church. This case presents serious difficulties. We must distinguish between parties who wish to obtain an absolute divorce from the secular court in order to marry again afterwards, and those who wish to obtain such divorce merely and solely for the purpose of securing certain civil effects, such as the protection of property rights, the custody of the children, etc. Now it is certainly very sinful, and is therefore never allowed, to apply to the secular court for an absolute divorce in order to marry again, in the case. For it would be the same as either attributing to the secular power the right to dissolve a valid marriage, or as using the secular court for the purpose of living in adultery. Consequently the *Third Plenary Council of Baltimore*, n. 124, very justly decrees: "Poenam excommunicationis statuimus, Ordinariis reservatam, ipso facto incurrendam ab iis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare."

44. But is it allowed to apply *for a civil divorce*, in the case, solely for the purpose of obtaining certain necessary civil effects? Can a Catholic judge grant such a divorce? Can a Catholic lawyer apply for it, in the name of his clients? We say, *for* a civil divorce; for it is apparent that all these parties can act *against* the divorce, in the case. We now answer: There are two opinions, both held by approved Catholic authors. The first opinion answers in the affirmative, namely, that the parties can apply for such di-

vorce, provided they intend and *declare* that they do not wish to break the marriage, but simply and solely to obtain the desired civil effects, and provided moreover there be a just and sufficient cause.[1]

45. The chief reasons are, (*a*) because otherwise no Catholic could accept the position of judge, which would redound to the great injury of the commonwealth; (*b*) the civil divorce in the case has in view merely the civil effects, and is therefore an indifferent act. Of course, there should be a sufficient cause to justify the recourse to the civil court. Such cause would be the securing of the custody of the children, of property rights, etc. This view seems also in conformity with the decisions of the Holy See, namely of the S. C. S. Officii, May 22, 1860, Apr. 3, 1877, June 25, 1885, May 27, 1886, July 26, 1889.[2]

46. The second opinion denies that Catholic spouses can ever apply for, or a Catholic lawyer plead for, or a Catholic judge grant an absolute divorce in the case, that is, where the marriage is valid before God and the Church, and that on the ground that such a divorce would be intrinsically evil. For, they say, the civil annulment of the marriage gives the married couple absolute freedom from the bond of marriage. In other words, the secular law regards them as no longer husband and wife; as deprived of the right to live together as husband and wife; as perfectly free to marry again. Now, they say, all this is intrinsically wrong where the marriage is in reality valid before God and the Church. This view, they contend, is clearly in accord with the decisions of the S. C. S. Officii, especially of May 24, 1886, with regard to France.[3]

47. However, against this reasoning it may be said that its supposition is to be denied. The secular law, and consequently the secular annulment of the marriage, has in view

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[1] Gasparri, de Matr. n. 1238. [2] Ib. n. 1165, 1246, 1247. [3] Ib. l. c. n. 1237.

chiefly the *civil effects* of the marriage, and does not intend to interfere with conscience, or to decide what is valid or invalid before God and the Church.[1] The secular court, in pronouncing a marriage invalid, simply declares that the marriage is dissolved so far as its civil effects are concerned.[2]

48. Whatever opinion may be held, it is plain that, especially where the marriage is valid before God and the Church, the parties cannot apply to the secular courts for an absolute divorce, except for *very grave reasons*, to be approved beforehand by the ordinary.[3] Nay, the Third Plenary Council of Baltimore, n. 126, wisely enacts that where circumstances make it necessary to have recourse to the secular courts, even though for a separation *a thoro et mensa* only, the advice of the ecclesiastical authority should be first sought.

II.

COMPETENCE OF THE STATE.

49. Q. What authority has the State or secular power, also with us, over the marriages of Catholics?

A. That the interests of civil society or of the State are deeply involved in the marriage of its members is apparent. Without marriage there could be no society. Hence marriage is the very corner-stone and foundation of society. Marriage is the foundation of public morality, and conduces greatly to the temporal as well as spiritual welfare of all. Now it is the right and duty of the State to guard public morality, and to promote the temporal prosperity of its citizens. There can be no doubt, therefore, that the state has considerable authority over all marriages, even of Catholics.[1]

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[1] Feije, de Matr. n. 583.

[2] Kenrick, Theol. Mor., Tr. 8, n. 114; Sabetti, Mor. n. 559. Q. 4; n. 561, Q. 6.

[3] Cf. Feije, l. c. n. 583.

50. Now, how far does this power extend? We have seen that the marriage of Catholics and baptized non-Catholics is a sacrament; that in their case the *contract*, or the marital consent, mutually given, constitutes the matter and form, and therefore the essential elements, of the sacrament. It is clear, therefore, that all that pertains to the nature, essential elements, validity, and intrinsic obligations of the marriage fall under the jurisdiction of the Church, not of the State.

51. Apart from these matters, there is also, in marriage, a purely temporal element, which consists in the effect produced by marriage upon the *civil* or *social status* of married people and their children. Hence these effects are called *civil* or *social.* They regard property rights, dower, inheritance, etc. The State has the right and duty to protect the temporal welfare of its citizens. Consequently it has the right to make laws concerning those civil consequences flowing from marriage.

52. Q. What are, especially in this country, the chief civil effects or legal consequences of marriage?

A. 1° By marriage, the husband and wife became *one person* in law; that is, the very being or legal existence of the woman is suspended, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything, and is therefore called a *feme covert*, in distinction from a *feme sole.* Upon this principle depend almost all the respective rights, duties, and disabilities of husband and wife.[2]

2° Consequently a man cannot convey to or covenant with his wife, except by the intervention of a third person.

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[1] Kutschker, l. c. vol. i. p. 75 sq.

[2] Hilliard, Elements of Law, p. 18.

A woman cannot sue or be sued without joining her husband. But she is liable alone for crimes.[1]

3° A husband is bound to support his wife, and if he does not, to pay any debt contracted by her for necessaries of life.[2]

4° Although at common law the wife cannot hold property separately from her husband, yet a court of equity or chancery, through the medium of a trustee, may treat her as having interests and obligations distinct from his. Upon this ground, marriage settlements made before or after marriage, for the exclusive benefit of the wife, are sustained, being designed to secure the wife a certain support in case of misfortune.[3]

5° In *real estate* belonging to the wife, the husband acquires a life interest by the marriage.[4] Marriage is an absolute gift to her husband of all the wife's *personal* chattels or things or property.[5]

6° Husband and wife cannot be *witnesses* for or against each other; the law taking care, on the one hand, to avoid the temptation to falsehood, and not to destroy domestic harmony, on the other.[6]

Thus it will be seen that the legal effects of marriage upon the civil and social status of the married couple are wide and far-reaching.

53. Q. What power, if any, does the secular authority, with us, in the United States, claim over the essence itself of the marriage, whether of Catholics, or Protestants, or infidels?

A. 1° Marriage, writes Walker,[7] whatever may be the popular idea of it, is regarded by the law as *merely a civil contract.*[8] Our secular law therefore treats marriage as it does other civil contracts; allowing it to be valid in all cases where the parties were (*a*) *willing* and (*b*) *able* to contract, (*c*) and *actually did* contract, (*d*) in the proper forms and solemnities required by law.[1] This view is, of course, erroneous. For, as we have seen, marriage among baptized persons is always a sacrament.

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[1] Hilliard, l. c. p. 19.
[2] Ib.
[3] Ib. p. 20.
[4] Ib.
[5] Ib. p. 53. Cf. Walker's American Law, p. 249 sq.
[6] Hilliard, l. c. p. 19.
[7] American Law, p. 246.
[8] Kent, Comm., Lect. 26, n. 87.

54. 2° According to our secular law, therefore, the parties must *first* be *willing* to contract, that is, their marriage consent must be *perfectly free*, not forced or coerced.

Secondly, they must be *able*, that is, they must not labor under any of the impediments, or disabilities and incapacities established by the civil law. Some of these legal impediments or disabilities make the marriage invalid, others only illicit, before the law. In most of the States many of the diriment impediments of the Church are also established by the secular law.[2]

Thirdly, the parties must actually contract in *due form* of law,[3] that is, with the formalities and solemnities prescribed by law. These solemnities have reference (*a*) to the person solemnizing the marriage, (*b*) the ceremonies of the solemnization, (*c*) the proving of this act, or of the marriage. Hence the question arises: By whom and in what manner may marriages be solemnized according to our secular law?

According to the common law, which is prevalent in some of our States, no particular ceremony is requisite; nor is it required that the marriage should be performed before any particular person, priest, or minister:[4] all that is required is the mutual consent, freely given, either expressly or presumptively.[5] We say, *according to the common law*, etc.; for by statutory law, prevalent in most of our States, marriages must be solemnized before a justice of the peace, or mayor of a city, or a minister of the gospel, or a priest, all of whom are authorized by law to solemnize marriages.[1] Marriage, when solemnized by a priest or a minister, should be according to the form of his church;[2] and when by a magistrate, no particular form is required, except that the parties must declare that they take each other as husband and wife.[3] In most States the law prescribes that the person solemnizing the marriage must make and keep a particular record of all marriages, and transmit a certificate of every particular marriage to the county clerk.[4]

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[1] Blackstone, Comm. book i. chap. 15.

[2] Cf. Revision of Statutes of N. J., p. 631; Walker, l. c. p. 247.

[3] Blackstone, Comm. l. c.

[4] Wells, p. 78.

[5] Kent, Comm. Lect. 26, n. 87.

55. 3° The secular government all over the United States, moreover, claims and exercises the power (*a*) to annul marriages already contracted, that is, to grant a divorce *a vinculo,* (*b*) and to grant a separation *a mensa et thoro.* In New Jersey the Court of Chancery alone has jurisdiction in all causes of divorce and of alimony or maintenance.[5] From all this it will be seen that the secular power claims wide powers over the marriage itself. We shall now inquire in what sense it makes this claim.

56. Q. In what sense does the secular power, with us, claim jurisdiction over the marriage itself, and not merely over its civil effects?

A. 1° Our lawgivers do not intend to legislate on or interfere in matters of a spiritual nature. For, by the Constitution of the United States, Church and State are entirely separate, and the civil power has no jurisdiction in ecclesiastical affairs. Consequently the action of the secular power in establishing diriment impediments, and in annulling by a divorce marriages already contracted, must be understood of the *civil effects only.*[6] The civil tribunals with us do not recognize the laws of the Church regarding impediments and the right of dissolving a marriage.[7] But neither do these tribunals reject these laws of the Church. They are simply passive; they neither forbid nor recognize them.

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[1] Rev. Statutes of N. J., p. 631; Walker, p. 248.

[2] Kent, l. c.

[3] Walker, l. c.

[4] Revised Statutes of N. J., p. 632.

[5] Ib. p. 314 sq.

[6] Kenrick, Theol. Dogm., tract. 18, n. 78, 79, 82.

[7] Ib. n. 82, 102, 110.

2° "The attitude of the State," says Mr. D. L. Kiehle, Superintendent of Public Instruction in Minnesota, in a circular issued in 1891, "is one of entire organic separation from religion as represented in denominations. To take this as showing indifference, or still more, opposition of the State to matters and institutions religious, is farthest from the truth; for in every way possible the State expresses the greatest interest in those bodies whose purpose, with that of the family, is to elevate and purify the character of the people. While the State must forego the exercise of authority in matters religious, in order to protect the interests of all religious bodies, she speaks in no uncertain sound requiring that the principle and purest type of morality be inculcated in the minds and habits of youth. It is her purpose in her government to acknowledge the truth that religion, morality, and knowledge are necessary to good government and the happiness of mankind."[1]

3° Again, it is admitted by all, that in the interest of order and the proper distribution of property and obligations, the marriage of parties shall be susceptible of *proof and recognition* before the civil law.[2] Consequently it is admitted by the Church that the State has the right to require, for instance, that the marriage record shall be transmitted by the priest or minister to the county clerk for registration.

§ 2. *Competence in Relation to the Marriage of Protestants.*

57. By Protestants we here mean all persons who belong to sects separated from the Catholic Church, and who are validly baptized, or at least presumed to be validly baptized, as explained above (n. 28).

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[1] See *Boston Pilot*, Oct. 1891.

[2] Kenrick, Theol. Dogm. tract. 18, n. 78.

58. Q. Who has, speaking in general, authority to adjudicate the matrimonial causes of Protestants?

A. The marriages of baptized Protestants are, as we have shown, sacraments, just like those of Catholics. Consequently the marriages of Protestants fall under the jurisdiction of the Catholic Church in the same manner as those of Catholics. For by baptism Protestants become members of the true Church—the Catholic Church. Now the mark of baptism remains forever in the soul. Hence they remain always subject to the authority of the Church, notwithstanding their separation from her,—just as a number of citizens rebelling against the legitimate government do not thereby gain exemption from its authority.

59. From what has been said it follows that Protestants contract all the impediments of marriage which are *juris positivi ecclesiastici*, except perhaps the diriment impediment of clandestinity enacted by the Tridentine decree *Tametsi*.[1] Consequently all marriages of Protestants with each other or with a Catholic, which are contracted with a diriment impediment, are null and void, and when brought to the cognizance of the Church must either be annulled or rendered valid,[2] v.g., by dispensation. It follows also that the marriage of a Protestant with an unbaptized person is invalid, owing to the impediment of *disparitas cultus*.[3]

60. We have said, which are *juris positivi ecclesiastici*. For Protestants are, as a matter of course, bound by all those impediments of marriage which are *juris naturalis* and *juris divini positivi*.[4]

61. It may be asked why we should speak here of the marriage of persons who are outside of the pale of the Catholic Church? Of what practical use is the question in this treatise? We answer, we treat of their marriages in

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[1] Card. Kutschker, l. c. pp. 443, 449.

[2] Schulte, Eherecht, p. 230.

[3] Feije, de Imped. n. 103.

[4] Kutschker, l. c. p. 443.

view of the fact that they may be converted and thus become active members of the true Church, or in view of the fact that they may come into contact with her by marriage with a Catholic. In these cases the question will arise, What as to the marriages contracted by them before they became Catholics? What in regard to a marriage about to be or already contracted between them and Catholics?[1] Hence the matter of Protestant marriages is of great practical bearing here.

62. Q. What is the theory of Protestants themselves concerning competence relative to their marriages?

A. Luther, in his book *De Capt. Babyl.*, holds that marriage, even among Christians, is never a sacrament, but merely a *contractus civilis et socialis*, and hence falls in every respect under the authority of the civil power, not of the Church. Consequently, he inferred, the Church has no power to introduce any rules or marriage impediments, other than those established in the Sacred Scriptures. Luther expresses this view even more clearly in his later writings, as follows:[2] "Vociferor et clamo, causas matrimoniales non ad me, sed ad saecularem potestatem referri debere. Nemo enim negare potest, matrimonium esse rem externam et saecularem, sicut vestem, cibum, domum et aream, ac saeculari potestati subjectam."[3] Protestants in general follow this teaching at the present day.

63. That this teaching and practice of Protestants are erroneous has been shown by us. In fact, as we have seen, and as Pope Benedict XIV.[4] writes: "Compertum est eum qui baptisma ab haeretico rite suscepit, illius vi *Ecclesiae Catholicae* membrum effici. . . . Exploratum habemus, ab haereticis baptizatos, si ad eam aetatem venerint, in qua bona a malis dispicere per se possint, atque erroribus baptizantis

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[1] Kutschker, l. c. p. 365.

[2] Kutschker, l. c. vol. i. p. 54.

[3] Cochlaus, Miscell. 1545.

[4] Const. *Singulari nobis*, 9th Feb. 1749.

adhaereant, illos quidem ab Ecclesiae unitate repelli, iisque bonis orbari omnibus, quibus fruuntur in Ecclesia versantes, *non tamen ab ejus auctoritate et legibus liberari.* Hoc quidem in transfugis ac perduellibus observatum videmus quos leges civiles a fidelium subditorum privilegiis omnino excludunt. Leges quoque ecclesiasticae privilegia clericalia iis clericis non concedunt, qui sacrorum canonum jussa negligunt. Nemo autem sentit, aut perduelles aut clericos canonum violatores suorum Principum aut Praelatorum auctoritate non subjacere. Haec exempla pertinent ad quaestionem; ut enim illi, sic haeretici Ecclesiae subditi sunt et legibus ecclesiasticis tenentur. Cum vero inter Ecclesiae leges illa quoque recensetur, quae matrimonia illorum, quorum unus rite baptismum acceperit, secus alter, rata non habet; in nostra quaestione statuendum erit, cum mulier haeretica baptismo initiata Hebraeo nupsit, matrimonium illud pro irrito habendum esse."[1]

64. The only objection that could possibly be urged is, that the Church *does not wish, as a matter of fact*, to bind Protestants by her laws, also on marriage. But this objection does not hold. It is true the Church can exempt Protestants, just as she does Catholics, by dispensation, from some of her laws. But has she done so? Does she wish or intend to do so? Has she declared that she exempts heretics from her laws on marriage? By no means. On the contrary, as we have seen, she has declared emphatically,[2] and continues to declare down to this day that she does not exempt them.[3]

65. Of course the Church, while considering Protestants as subject to her laws, also on marriage, does not, however, attempt to *coerce* Protestants into observing them. For she knows that such an attempt would be absolutely useless;

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[1] Apud Kutschker, l. c. pp. 444, 445.

[2] Bened. XIV. l. c.

[3] S. C. C. *Rosen.* 20th Aug. 1870; Kutschker, l. c. vol. i. p. 448.

Protestants would only laugh at her. When, however, a Protestant becomes converted, or wishes to marry a Catholic, then it is that she compels him to obey her laws.[1]

Hence it is that the respective Catholic ecclesiastical judge is competent in all matrimonial causes, where one of the married couple is Catholic, and the other Protestant or unbaptized; and in such a case both the Protestant or infidel as well as the Catholic party must present his or her petition for the annulment of the marriage to the proper Catholic ecclesiastical judge.

§ 3. *Competence relative to the Marriages of Jews, Pagans, and other unbaptized Persons.*

66. We have seen that the marriage of infidels or of unbaptized persons, also at the present day, is not a sacrament; but that it is a *natural* contract, instituted by God Himself; that this natural contract is indissoluble and monogamous, both by God's positive law, and by His divine natural law or by the very nature, aim, and obligations of the married state; that therefore these marriages are true and legitimate, if they are contracted without any of the impediments which are *juris divini positivi et naturalis.*

67. Who has, in general, competence or authority over the marriage of infidels?

A. 1° From what has been said it follows that the Church has no competence over these marriages, for they are not sacraments. Hence these marriages are not subject to the diriment impediments established by the *positive* laws of the Church, or to the impediments which are merely *juris ecclesiastici.* They contract only those which are *juris divini* or *naturalis.* Consequently, as Pope Innocent III.[2] declares, if pagans or unbaptized persons, who were married within the second, third, or fourth degree of consanguinity, or in any of the degrees of affinity, become converted, they are not to be separated on that account. For as pagans they are not subject to the laws of the Church. Hence their marriage was valid and indissoluble, and consequently remains so after their conversion.[1] Of course we speak of the marriage of unbaptized among themselves, that is, v.g., of a Jew with a Jewess, etc. For the marriage of an infidel with a baptized person falls under the positive law of the Church, and therefore also under the impediments which are *juris ecclesiastici*, as we have seen.

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[1] Kutschker, l. c. p. 449.

[2] Cap. 8, de divort.

68. Q. What is to be said of the marriage of infidels while in infidelity, when one becomes baptized and converted?

A. 1° If both became converted and baptized, their marriage, contracted by them, while infidels, remains not only true and valid, but becomes, moreover, absolutely indissoluble, like that of Catholics, provided of course the marriage contracted in infidelity was not invalid by reason of a diriment impediment *juris naturae*.[2]

2° If *one alone* becomes converted, then, if the marriage contracted by both, while unbaptized, was valid at the time, according to the natural and divine positive law,—that is, if there were no diriment impediments *juris naturalis* or *juris positivi divini* in its way,—the conversion and baptism do not *per se* change anything in the validity of the marriage.[3] Hence if the unbaptized party is willing to continue the marital union, *sine contumelia creatoris*, the marriage cannot be dissolved. We say, *if the unbaptized party is willing*, etc.; for by divine dispensation, as explained by St. Paul,[4] when the infidel does not wish to continue the union, save *cum contumelia creatoris*, then if this is certain, upon due interpellation, the marriage becomes dissolved by a subsequent marriage of the converted party with a Catholic.

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[1] Kutschker, vol. i. p. 366 sq.

[2] Ib. p. 376.

[3] Ib. p. 373.

[4] 1. Cor. viii. 15.

69. From what has been said it follows also, that when a male infidel who has several infidel wives becomes converted, he must remain with the *first* wife validly married by him, if she becomes converted, or remains *sine contumelia creatoris;* if not, he can marry any of the wives who become converted. And if none becomes converted, or wishes to remain with him, *sine contumelia creatoris*, he can marry any Catholic woman who is free to get married.

70. Q. Has the civil power competence over the marriage of infidels?

A. We premise: the question refers mainly to the diriment impediments, and is therefore equivalent to this one: Has the civil power, Catholic or Protestant or infidel, power to create diriment impediments in relation to the marriage of infidels? We answer, the question has never been decided by the Church, and is consequently a free subject for discussion and difference of opinion. As a matter of fact, there are two opinions among Catholic authors: one denies, the other affirms.

71. Those who hold the affirmative base their opinion on different grounds. Some say that the marriage of infidels is merely a civil contract, and therefore, like any other civil contract, falls under the jurisdiction of the secular power.[1] Others, however, more correctly teach that the marriage of infidels is not a mere civil contract, but something sacred and religious by its very nature and origin. Thus Pope Leo XIII., in his celebrated Encyclical of February 10, 1880, teaches: " Etenim cum matrimonium habeat Deum auctorem, fueritque vel a principio quaedam Incarnationis Verbi Dei adumbratio, idcirco inest in eo sacrum et religiosum quiddam, non adventitium, sed ingenitum, non ab hominibus acceptum, sed natura insitum." Consequently, say they, the civil power has no *direct* or *innate* power even over the mar-

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[1] Heiss, de Matr. pp. 27, 28.

riages of infidels. For, as Pope Leo XIII. says in the above Encyclical: "Cum matrimonium sit *sua vi*, *sua natura*, *sua sponte sacrum*, consentaneum est, ut regatur ac temperetur non principum imperio, sed divina auctoritate Ecclesiae, quae rerum sacrarum sola habet magisterium."

72. Yet, they continue, the secular authority has *devolutive* power over the marriages of unbaptized persons. For it is of the greatest moment to civil society that marriages should be regulated also by positive laws, not merely by the natural. Now for infidels there is no legitimate ecclesiastical authority, distinct from the civil, which has competence over their marriages. Hence, by devolution, the secular power is alone competent in the case, and can therefore enact diriment impediments. Otherwise God would not have provided sufficiently for the welfare of civil society.[1]

Of course the secular power cannot in any case enact diriment impediments which are opposed to the positive law of God and the natural law relative to marriage.

73. Those who maintain the negative contend that marriage is indeed *a contract*, that is, a mutual agreement; but that apart from this it has nothing in common with other contracts by which social or worldly affairs are regulated;[2] that it is therefore not merely a civil contract, but a *contractus naturalis divino jure ante omnem civilem societatem institutus atque formatus*, as Pope Pius VI. writes in his letter to the Bishop of Erlau; that, consequently, the marriage of infidels is a contract which is and can be regulated in its essential elements solely by the natural and divine positive law, and therefore not by the secular power.[3]

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[1] Gasparri, l. c. 281, 282.

[2] Kutschker, l. c. vol. i. p. 34.

[3] Kenrick, Theol. Dogm. vol. iii. p. 391.

ART. II.

COMPETENCE IN A PARTICULAR CAUSE.

74. We have seen that the Church alone or the ecclesiastical judge has the right and power to determine what constitutes a valid marriage among Catholics and baptized non-Catholics. Consequently she alone has the right, where in a particular case it is claimed that a marriage has been invalidly contracted, to decide whether such contested marriage was validly contracted or not, v.g., whether the consent was free or forced, whether there was any other impediment or not. Hence it is clear that all contentions relative to the validity of a marriage already contracted are to be brought before the ecclesiastical, not the secular, tribunal.

§ 1. *Competence of the Ordinary in whose Diocese the Husband has his Domicile.*

75. However, the plaintiff or petitioner cannot bring his cause before any ecclesiastical judge or court he pleases; but he must bring his case before that particular judge or court which is designated by the law of the Church as having jurisdiction in the particular case. For not all ecclesiastical judges possess indiscriminately jurisdiction or competency in every matrimonial cause that may arise. The Church, like the State, is an organization or society, whose rulers and officials are graded, and have each a particular and limited district or territory assigned to them, within which alone they possess authority to exercise juridical functions, or to hear and decide matrimonial causes.

76. Thus the Sovereign Pontiff, being the supreme ruler of the entire Church, is vested with ordinary and

immediate jurisdiction over the entire Church, and therefore has competence, also in the first instance, to hear and decide matrimonial causes throughout the whole Church. Bishops have jurisdiction only in their respective districts, called dioceses, and consequently only over those who live in these districts.

77. Consequently the law of the Church is, that all matrimonial causes are to be brought in the first instance before and decided by the bishop in whose diocese the parties have their domicile. Now by marriage the very being or legal existence of the wife is merged into that of her husband. Hence, by fiction of law, she is generally speaking supposed to live where he lives, even though in reality both live apart. Therefore, the bishop of the diocese where the husband has his domicile is, as a rule, the competent judge.[1]

§ 2. *Competence where Husband and Wife are separated.*

78. We have said above, *as a rule;* for there are two exceptions. The first exception is, where the husband and wife have been legitimately separated *a mensa et thoro.* The reason is, that by such separation the wife regains her separate individuality before the law, which, as we have seen, she had lost by her marriage. Consequently also she resumes, by the separation, her separate domicile just as though she were not married. Therefore the general principle *uxor sequitur domicilium mariti* ceases to apply when the husband and wife are legitimately separated, and as long as this legitimate separation lasts. Hence, in the case, the principle revives: *actor sequitur forum rei.* In other words, that ecclesiastical judge alone has competence in the case to whom the defendant or the spouse against whom the annulment of the marriage is petitioned is sub-

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[1] Our Elements of Eccl. Law, vol. ii. n. 1411 sq.

ject, or in whose diocese he or she is domiciled. Thus if in the case the husband petitions for the annulment, he must do so before the Ordinary in whose diocese his wife lives. And if the wife wishes to demand the annulment, she must do so before the bishop in whose diocese the husband has his domicile.[1]

79. We have said, *legitimately separated.* Three things are required according to the letter of the law of the Church, and apart from custom, to render a separation *a mensa et thoro* legitimate *in foro externo*:[2] (*a*) a just cause, namely, adultery, apostasy from the true faith or heresy on the part of one of the spouses, incitement to crime, and cruel treatment;[3] (*b*) a summary juridical process or trial, in which the existence of the above causes is juridically proved; (*c*) a judicial sentence of the judge granting the separation. Hence, whoever wishes, according to the letter of ecclesiastical law, to obtain a separation, must first present to the bishop a formal petition for the separation, and state the causes therefor. Then follows the process for the proving of the alleged causes. At its end, the judge, if he finds that the causes are canonical and are fully proven, pronounces the sentence granting the separation, either for life, or as the case may be, for as long a time as the cause lasts.

80. We say, *according to the letter of the law and apart from custom.* For by custom prevalent all over this country, and also in many parts of Europe, the separation *a mensa et thoro*, at least when not perpetual, seems to be legitimate, whenever it takes place for just cause, as approved by the bishop or by the parish priest, and therefore

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[1] Gasparri, l. c. vol. ii. p. 340.

[2] The Instr. Austr., § 205, says: "Ipsum (conjugale vitae consortium) igitur in casibus tantum a lege ecclesiastica statutis et respective in forma a lege ecclesiastica praescripta solvere licet."

[3] Our Elements, vol. ii. n. 1437 sq.

without any judicial process or sentence.[1] In truth, this appears clearly inferable from the fact that neither the S. C. de P. F. in its Instr. *Causae matrimoniales*, nor the Plenary Councils of Baltimore, especially the Third, make any allusion whatever to the necessity or obligation of a judicial process and sentence in the case of a separation *a mensa et thoro*.

81. The second exception to the principle *uxor sequitur domicilium mariti* is, where the husband has deserted his wife maliciously, that is, without just and sufficient cause. In this case the wife thus deserted can institute proceedings for the annulment of the marriage before the bishop of the diocese where she lives, and she is not obliged to go before the bishop of the diocese where the husband lives. And justly so. For it is but right that the husband should not reap any advantage from his criminal act or desertion. While, however, the wife in the case is not obliged to petition for the annulment in the court of the husband's domicile, she may do so if she wishes, since in the case of such a malicious desertion both the bishop of the domicile of the husband and the bishop of the domicile of the wife are competent.[2]

82. But what if the wife abandons her husband maliciously or without just cause? The Instr. *Causae matrimoniales* does not mention this case,—no doubt because a woman will rarely leave her husband without just cause. Yet the case will happen, and has happened to our knowledge. Who is the competent judge for the annulment of the marriage in this case? The woman not being legitimately separated *quoad mensam et thorum* from her husband, in the case, retains the domicile of her husband, and consequently the Ordinary of the diocese where the husband is domiciled, or quasi-domiciled, is the only competent judge.[3]

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[1] Our Elements, vol. ii. n. 1448.

[2] Gasparri, l. c. vol. ii. p. 340, note 2.

[3] Ib. p. 135, note 1.

Whenever it remains doubtful who has competence, it is prudent to have recourse to the Holy See, which will either determine what Ordinary is competent, or delegate an Ordinary, even though not *per se* competent, to adjudicate the cause.[1]

83. But in all cases, after the judicial citation has been served on the parties, a change of domicile on the part of the married couple or either of them does not in the least effect any change in the competence of the judge.

84. All this is expressly and clearly laid down by the S. C. de Prop. Fide, in the Instr. *Causae matrimoniales*, § 2, as follows: "Conjuges in causis matrimonialibus subsunt episcopo in cujus dioecesi maritus domicilium habet. Exceptioni locus est si conjugale vitae consortium aut per separationem a thoro et mensa, aut per desertionem malitiosam a marito patratam sublatum sit. Priori casu quaelibet pars jus accusandi contra alteram ipsi competens coram episcopo dioecesis, ubi haecce domicilium habet, exercere *debet.* Posteriori casu uxor apud episcopum, intra cujus dioecesim domicilium ejus situm est, actionem instituere *potest.* Postquam autem citatio judicialis intimata est, mutatio quoad comjugum domicilium facta, mutationem respectu judicis competentis minime operatur."

§ 3. *Competence by Reason of a Quasi or Imperfect Domicile.*

85. Q. Does a quasi-domicile also give the ecclesiastical judge competence in matrimonial causes of nullity?

A. What we have said thus far applies to the bishop of the place or diocese where the parties have their true domicile in the full sense of the word. By a true domicile is understood the place where the parties actually live, and where they intend to live permanently, if nothing unforeseen calls them away. Besides this perfect domicile, there is another kind of domicile which is imperfect, and is therefore called quasi-domicile, or domicile, in a broad sense of the term. We shall now inquire what is meant by a quasi-domicile, and whether it gives competence in the causes under discussion.

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[1] Gasparri, l. c.

86. A quasi or imperfect domicile is a place where parties live with the intention of remaining there, not permanently, but only for some time, namely, for a considerable portion of one year, v.g., for six months, as happens in the case of students at college away from home, servants, etc.[1] Two things are required to constitute a quasi-domicile, as is indicated in our definition, namely, (*a*) to live in the place, (*b*) and to have the intention of living there, not indeed permanently, but yet for a considerable part of one year, v.g., for six months. Where these two conditions are verified, the quasi-domicile is acquired from the very first day on which the party takes up his abode in a place.

87. The intention of remaining for a considerable portion of a year may appear from the very nature of the stay in a place. Thus it is at once apparent that a student who goes to college intends to remain there for the scholastic term of ten months. Where this is not the case, the intention in question is inferred or presumed by the law itself (*praesumptio juris*) from the fact of a person remaining one full month in a place.[2] But this presumption, being merely a simple presumption of law, formerly admitted of proof to the contrary.

88. We say, *formerly*. For at the present this presumption is *juris et de jure*, at least in this country. Hence, if at present a person with us lives in a place for one month, the law of the Church infers absolutely that he has the intention of remaining for a considerable portion of a year, and that he has therefore acquired a quasi-domicile, *in ordine ad matri-*

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[1] Schmalzg. l. 2, t. 2, n. 16.

[2] Conc. Pl. Balt. III. p. 256.

monium. Thus the S. C. S. Officii, in answer to a petition addressed to the S. C. de P. F. by the *Third Plenary Council of Baltimore*,[1] decided on May 6, 1886, "se transferentes e loco ubi viget caput *Tametsi* in alium locum, dummodo ibi commorati fuerint per spatium saltem *unius integri mensis* . . . censendos esse ibidem habere quasi domicilium in ordine ad matrimonium, quin inquisitio facienda sit de animo ibi permanendi per majorem anni partem."[2]

89. Having seen what constitutes a quasi-domicile, we now ask: Does this imperfect kind of domicile give the ecclesiastical judge competence or jurisdiction in matrimonial causes of nullity? It is certain that such a domicile gives jurisdiction *in foro interno*, and also *in foro externo voluntario*, in regard to all the sacraments, save that of orders.[3] Does it also confer jurisdiction *in foro externo contentioso*, and particularly in matrimonial causes of nullity? There are two opinions. The affirmative is the more probable opinion, and is based chiefly on the ground that a person becomes subject to the Ordinary by a quasi-domicile no less than by a true and full domicile.[4] This opinion, according to Gasparri,[5] may be safely followed in practice, on the principle that in case of a true doubt the Church supplies jurisdiction. The negative, on the other hand, is based on the argument that by a domicile the law always means a true and full domicile, and not merely a quasi or imperfect domicile.[6] Now, the Instr. S. C. de P. F. always uses the word *domicilium*, but never *quasi-domicilium*.[7]

90. Wanderers (*vagi*) or persons who rove from place to place, and have no domicile or quasi-domicile anywhere,[8] are regarded as having their domicile wherever they are for the time being. Consequently they can lodge the petition

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[1] Conc. Pl. Balt. III. p. cix.

[2] Apud Conc. Prov. Neo-Eborac. IV. p. 91.

[3] Schmalzg. l. ii. t. 2, n. 17; Reiff. l. 2, t. 2, n. 40.

[4] Reiff. l. c. n. 40.

[5] L. c. n. 1168.

[6] Reiff. l. c. n. 38.

[7] S. C. de P. F., Instr. *Causae Matr.* § 2.

[8] L. 27 ff. ad Municip. (50, 1).

for the annulment of the marriage before the bishop of the diocese where they happen to be at the time, according to the maxim: "Ubi te invenero ibi te judicabo."[1]

§ 4. *Competence by Reason of the Celebration of the Marriage.*

91. Q. Is the bishop of the diocese where the marriage was celebrated competent when the parties live outside of his diocese at the time they ask for the annulment?

A. It is plain, of course, that he is competent, like other Ordinaries, in similar circumstances, when the defendant spouse against whom the annulment is sought has either a domicile or a quasi-domicile in his diocese, or is there as a wanderer at the time. Our question therefore regards the case only where the parties have at the time the petition is presented for the annulment of the marriage no domicile or quasi domicile in the diocese where they formerly contracted marriage.

92. There are two opinions. The affirmative is based on the general principle of ecclesiastical law, that the bishop acquires competence by reason of a contract having been made in his diocese,[2] so that he can hear and decide all that pertains to such contract of whatever kind, and therefore also the contract of marriage, even though the parties who made the contract—v.g., who contracted marriage—in his diocese have no domicile or quasi-domicile there when the action for the annulment of the marriage is instituted, provided, however, they are there at the time when the action is instituted.[3]

93. This opinion appears to receive strength from the fact that the Holy See, when petitioned to grant a dispensation from the "matrimonium ratum et non consummatum," or to declare a marriage invalid, always deputes, according

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[1] Gasparri, l. c. n. 1168; Reiff. l. c. n. 46.

[2] L. 19 ff. de Jud. (v. 1).

[3] Cap. *Romana* 1, de for. comp. in 6° (ii. 2), § 3, *Contrahentes.*

to Gasparri,[1] the bishop of the diocese, or place where the marriage was solemnized, to institute the process, etc., and that for the purpose of avoiding the question of domicile, which is not unfrequently difficult of determination.

94. Those who hold the negative contend that the law conferring competence by reason of contract refers not to matrimonial causes of nullity, but only to other contracts. In fact, they say, neither the Instruction *Causae matrimoniales* of the S. C. de P. F. nor the *Instructio Austriaca* makes any mention whatever of the competence by reason of the marriage having been contracted in a place. Nor do authors mention this *forum contractus* in relation to marriages. Whence it may reasonably be inferred that the *forum contractus* is not competent in matrimonial causes of nullity.

95. Gasparri[2] writes that even though, considering the above two opinions, it be doubtful whether the *forum contractus* is competent in matrimonial causes of nullity, yet this *forum contractus* can proceed in matrimonial causes of nullity, on the principle that in cases of such doubt—that is, where the competence is not certain, but yet where there are good and probable reasons for it—the Church supplies the jurisdiction. We say the *forum contractus can*, etc.; for it is not *obliged*, in case of doubtful jurisdiction, to exercise competence.[3]

96. Q. What is to be done if the parties challenge the bishop as incompetent?

A. The Austrian Instruction answers: 1° "Si conjuges vel nupturientes qui in causis matrimonialibus citantur competentiam tribunalis impugnari posse autumant, eidem (tribunali) intra decem post citationem intimatam dies, exceptiones suas exponere debent. Quando reclamatio pro non fundata declaretur, liberum eis est ad instantiam proxime superiorem appellationem dirigere."[4]

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[1] L. c. n. 1169. [2] L. c. n. 1169. [3] Ib. n. 1170. [4] Instr. Austr. § 103.

2° "Competentia, quam impugnarunt, per tribunal superius confirmata, contendentes coram primae actionis judice causam dicant oportet."[1] All this is fully in accord with the general law of the Church relative to disputed competence, as explained by us elsewhere.[2]

97. Q. What is the remedy provided by the law of the Church if the bishop, though competent, refuses to admit or act on the *accusatio matrimonii*, on the ground that it is devoid of any solid foundation?

A. This action of the bishop is equivalent to a final decision, and has plainly the same effect. For it is equivalent to declaring the marriage valid.[3] Hence it is allowed to appeal against it to the Metropolitan or Holy See, just the same as against a final decision proper.[4]

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[1] Ib. § 104.

[2] Our Elements of Eccl. Law, vol. ii. n. 1038 sq.

[3] Our Elements, vol. ii. n. 1208 sq.

[4] Gasparri, l. c. n. 1170.

PART II.

DIRIMENT IMPEDIMENTS.

(*Impedimenta dirimentia.*)

98. The diriment or annulling impediments constitute the matter of the matrimonial trial or process in which there is question of the nullity of a marriage. For a marriage can be invalid only because an annulling impediment stood in its way at the time it was celebrated. We shall here briefly give (*a*) the nature and various kinds of annulling impediments; (*b*) a description of each, as in force at the present day.

CHAPTER I.

NATURE AND VARIOUS KINDS OF DIRIMENT IMPEDIMENTS.

Art. I.

CORRECT IDEA AND AIM OF THESE IMPEDIMENTS.

99. Q. What is an annulling impediment?

A. It is a hindrance or obstacle which disqualifies or disables persons to give their mutual consent to be husband and wife, in a valid manner.[1] From this definition it will be seen that when persons thus disqualified nevertheless give their marital consent, they do so, not only unlawfully, i.e., not only in violation of the prohibition or hindrance, but also invalidly,[2] that is, without effect, and as though they had not consented at all. Their consent suffers from a radical defect, and is of no force whatever.[1]

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[1] Feije, de Imp. n. 78.

[2] Schulte, Eher. p. 30.

100. What is the scope or aim of these impediments?

A. To cause marriages to be contracted in such a manner that they will be in harmony with the holiness, ends, rights, and duties of the married state; to protect the interests and welfare of the contracting parties; to hinder especially certain evils and pernicious consequences which would follow from marriages contracted contrary to the propriety, holiness, and ends of the married state.[2] Hence a diriment impediment constitutes both a prohibition to contract a particular marriage and an annulling of it. A person, therefore, who knowingly and wilfully contracts a marriage with a diriment impediment commits a grievous sin, and of course contracts invalidly. In other words, the law —and by law we here mean the divine, natural, and positive ecclesiastical law—in creating diriment impediments, wished to prevent absolutely certain marriages detrimental alike to individuals and to society. In order to do so more effectually, it not only forbids them, but moreover declares them, if contracted notwithstanding this prohibition, null and void.

ART. II.

VARIOUS KINDS OF DIRIMENT IMPEDIMENTS.

101. Q. How many annulling impediments are there at the present day?

A. 1° Defective consent; 2° stipulations contrary to the substance of marriage; 3° error; 4° slavery; 5° force and fear; 6° abduction; 7° clandestinity; 8° consanguinity, whether natural, spiritual, or legal; 9° affinity; 10° public propriety; 11° the bond of an existing marriage (*ligamen*); 12° crime; 13° absence of baptism in one of the contracting parties only (*cultus disparitas*); 14° sacred orders; 15° solemn vows or religious profession; 16° want of requisite age; 17° impotence; 18° annulling decree of the Roman Pontiff.[1] All these impediments are divided into various classes, according to their different origin, special aim, effects, etc., as we shall now see.

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[1] Bangen, Instr. Pract. Part ii. p. 79.

[2] Feije, l. c. n. 100.

102. Q. How are these impediments subdivided, on account of their different origin, aim, effect, etc.?

A. 1° By reason of their *source* or *origin*, into those which proceed (*a*) from the *natural law*, (*b*) from the *divine positive law*, and (*c*) from the *purely ecclesiastical law*. For diriment impediments are laws forbidding and annulling a certain kind of marriages. Now all laws or rules of action laid down for man have their origin either (*a*) in the very nature of things, as established by God, and in the moral law imprinted by God in the heart of every human being, or (*b*) in the positive and express command of God, or finally (*c*) in the legislative enactments of the Church and the State.[2] Consequently all the impediments are established either by the natural law, or by God's positive law, or by the legislation of the Church.

2° By reason of the *right to ask for the annulment* of a marriage already contracted, into impediments (*a*) *juris privati*, and (*b*) *juris publici*. The former are those which are established chiefly for the benefit of the married couple itself.[3] Consequently they may be removed by the couple. Hence no one but the married couple has a right to petition for the annulment of a marriage contracted with an impediment *juris privati*.[4] The latter are those which are made chiefly for the common welfare and for the public good. Consequently the right to ask for the annulment of a marriage contracted with an impediment *juris publici* belongs not only to the married couple, but also to any other person, as the annulment in the case is a matter of public interest.[1]

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[1] Feije, l. c. n. 79.

[2] Kutschker, l. c. vol. i. p. 50.

[3] Walter, § 299.

[4] Permaneder, p. 528; Schulte, Eher. p. 32; Gerlach, p. 132.

3° By reason of the impediment being *publicly known* or not, into public and occult.

103. Q. What are respectively the impediments that proceed from the natural, divine positive, and ecclesiastical law?

A. 1° The diriment impediments *juris naturalis* are those which flow from the very nature of marriage itself. They are: (*a*) all those which proceed from a defect or want of consent, such as error, violence and fear, insanity, etc.; (*b*) impotence; (*c*) stipulations repugnant to the substance of marriage; (*d*) the impediment of consanguinity in the first degree (*lineae rectae*) is also generally classed as *juris naturalis.* 2° The impediment of an existing marriage is more commonly classed as an impediment *juris divini positivi*, though it may also justly be regarded as *juris naturalis.* 3° Nearly all the other impediments are certainly *juris ecclesiastici.*[2]

104. Q. Who can dispense from diriment impediments?

A. The Church can of course grant dispensation from the impediments which are *juris ecclesiastici.* But she cannot dispense from those which are *juris naturalis* and *juris divini positivi*, for the reason that the will of God, as manifested in the natural law and also in His positive and express commands, is above any power on earth.[3]

105. Q. What are the impediments which are classed as *juris privati* and *juris publici?*

A. 1° The impediments *juris privati* are: (*a*) error; (*b*) violence and fear; (*c*) slavery; (*d*) impotence.

2° The impediments *juris publici* are: (*a*) want of requisite age; (*b*) an existing marriage (*ligamen*); (*c*) sacred orders; (*d*) solemn vows; (*e*) absence of baptism (*cultus disparitas*); (*f*) blood relationship, which is subdivided into natural, spiritual, and legal; (*g*) affinity; (*h*) public propriety: (*i*) crime; (*j*) abduction; (*k*) clandestinity.[1]

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[1] Cf. Feije, l. c. n. 85.

[2] Ib. l. c. n. 81.

[3] Ib. l. c. n. 82.

CHAPTER II.

DIRIMENT IMPEDIMENTS "JURIS PRIVATI."

106. Having in the foregoing chapter discussed impediments in general, we shall now proceed to treat of each one separately. First we shall describe those which are *juris privati*, then those which are *juris publici.* The present chapter will be devoted to the former; the next to the latter.

107. The diriment impediments *juris privati* arise, with the exception of impotence, from a *defective consent*. The mutual consent or assent of both the contracting spouses is *absolutely necessary* to the validity of a marriage. In fact, as we have seen, marriage is nothing else than the consent of a man and a woman to be husband and wife. The consent is therefore the *cornerstone* or efficient cause of marriage.[2] Hence, whatever destroys or materially diminishes the marital consent invalidates the marriage, and that by the very law of nature and of God, according to which marriage consists in the free consent of the parties.

108. We shall therefore inquire first into the characteristics of this consent; then into the chief impediments arising from a defect in the consent.

ART. I.

NATURE AND REQUIREMENTS OF THE MARRIAGE CONSENT.

109. Marriage, as we have seen, is nothing else than a contract between a man and a woman, by which they mutu-

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[1] Bangen, l. c. P. ii. pp. 81, 82.

[2] Cap. 23, 25, de Sponsal.; Kutschker, l. c. vol. iv. p. 93.

ally bind themselves to live indissolubly together for the purpose of bringing forth and educating children and for mutual assistance. Thus it will be seen that marriage is a contract. Now the essence of a contract is the mutual agreement, that is, the act of the will of both parties assenting to do or to omit something. In marriage the contract is the act of the will, externally manifested, of the man and woman assenting mutually to live indissolubly together for the sake of bringing forth children, etc.

110. Hence two things are essentially requisite to constitute a valid matrimonial contract, as well as any other contract: (*a*) a knowledge of the obligations of the contract; (*b*) freedom in the act of the will. For, as St. Thomas (3 Ethicor. lect. 4) says, "voluntarium (consensus, contractus) est id cujus principium est in ipso operante . . . ita tamen quod ipse operans sciat singulas circumstantias, quae concurrunt ad operationem." In other words, the consent is the "actus procedens a voluntate illuminata ab intellectuali cognitione singulorum, nempe objecti, finis, et circumstantiarum."[1] Consequently a person who gives his marriage consent without knowing the essential nature and obligations of marriage does not contract marriage validly.

111. Hence, also, the parties must have a sufficient degree of intelligence to enable them to realize that marriage consists in the life-long, exclusive, and sacred right of the parties to each other's persons, for the purpose of bringing forth children, etc.[2] As we shall see, prior to the age of puberty (12 in girls and 14 in boys) this sufficient degree of understanding is not presumed, but must be proved; on the other hand, after the age of puberty it is presumed, and the contrary must be proved.[3] It should be observed, however, that an *explicit* and perfect knowledge of the obligations and nature of the marriage contract is

[1] Sabetti, Mor. n. 4. [2] Gasparri, n. 777. [3] Cap. 8 de desp. impub.

not necessary to its validity. It is sufficient if the parties have a general knowledge of the marriage duties and obligations, and intend to contract a true marriage like other people.[1]

112. An erroneous impression annuls the marriage only when it touches the substance of the marriage, and even then only when it is expressly put forth as a condition of the consent. Thus, sometimes Catholics, in those parts of this country where the decree *Tametsi* is not in force, get married before the Protestant minister or the civil magistrate, and yet imagine such marriage is invalid.[2] This is an error. But such error does not invalidate the marriage, because it falls only on the form, not on the substance, of the marriage, and does not prevent the parties from having the wish and intention of really getting married.[3]

113. From what has been said it will be seen that the marriage consent must 1° be *free*. For marriage is a union of love and choice, and has moreover the gravest obligations annexed. Hence whatever destroys or considerably lessens the freedom of will of the contracting parties, v.g., grave fear resulting from violence, is an annulling impediment.

114. 2° The consent must be given with due knowledge of the nature and duties of marriage, and also with due *advertence*, such as is required to commit mortal sin. Consequently a marriage contracted by a person while *drunk*, or *insane*, or laboring under a *substantial error*, or by *imbeciles* who are simple or weak-minded to such a degree as not to know sufficiently the nature and obligation of marriage, is invalid, and that by natural law.[4] Monomaniacs, that is, persons who have a certain fixed erroneous idea, can, however, marry validly,[5] provided their fixed ideas have no

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[1] Gasparri, n. 774. [2] Ib. n. 793. [3] S. C. de P. F. 1 Oct. 1785.

[4] Kutschker, l. c. vol. iv. pp. 95, 96, 104.

[5] Cap. 24 de Sponsal.; Schulte, Eher. p. 74.

connection with or relation to marriage, and provided their ideas on marriage are right.[1]

In general, therefore, it may be said that persons who are in such a state, at the time of the marriage, as not to be able to realize the nature and effect of what they are doing, and who consequently do not act with due deliberation and knowledge, do not contract marriage validly. Of course, the *onus probandi* lies upon the person asserting the absence of due knowledge and deliberation. Until the latter is fully proved, the marriage is valid *in foro externo.*

115. 3° The consent must also be *internal* and *true.* Consequently a *fictitious* or *feigned* consent does not constitute a valid marriage.[2] A fictitious consent is one where a person by words or other external signs pretends to contract, but in his mind dissents altogether, that is, intends not to contract.[3] But it is to be observed that where a person claims or asserts that he gave only a *feigned* consent, this *dissembling* or feigning must be proved by him by the fullest canonical proofs. The *onus probandi* lies upon him, and until he has clearly and fully proved the simulation the marriage is considered valid *in foro externo.*[4]

Nay, *in foro externo* nobody is to be heard or allowed to petition for the annulment of a marriage because of fictitious consent, unless he claims that he had a sufficient cause for dissembling, that is, unless he claims that he consented from grave fear or was deceived.[5]

We say, *in foro externo;* for *in foro conscientiae*, the marriage of a person who asserts that he gave merely a feigned consent is to be regarded as invalid, and the parties should be induced to give a true consent,[6] or to petition the Holy See for a dispensation *a matrimonio rato*, prior to its consummation.[7]

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[1] Can. 26, C. 32, Q. 7.

[2] Cap. 26, § *Nos autem*, de Spons. et Matr.

[3] Mansella, Proc. jud. p. 7.

[4] Cap. 26 de Spons. et Matr.

[5] Kutschker, vol. iv. p. 114.

[6] Mansella, l. c. p. 7.

[7] Cf. Lehmkuhl, Comp. p. 505.

116. 4° The consent is to be *manifested externally*, either by words or signs; otherwise the marriage or the consent could not be proved.[1]

117. 5° It must be moreover *reciprocal* or *mutual*, that is, given by *each* of the two spouses. For marriage is not a mere donation, but a contract, and therefore requires the consent of *both* of the contracting parties. Wherefore, if, at the celebration of the marriage, only *one* of the spouses gives the consent and the other does not, the marriage is invalid. The consent of both should be given at the same time, at least, morally speaking.[2]

ART. II.

THE IMPEDIMENT OF ERROR.

(*Impedimentum erroris.*)

118. We have described the nature of the marriage consent, the absence of which constitutes the chief impediments *juris privati*. We shall now discuss separately the principal impediments, recognized by the law of the Church, which proceed from a want of due consent. They are: 1° error; 2° the slavery of one spouse ignored by the other; 3° violence and fear. To these is to be added impotence, which, though not proceeding from a defect in the consent, is yet *juris privati*, because the spouses affected by it may live together as brother and sister and therefore are, as a rule, alone entitled to ask for the annulment of the marriage. In this article we shall speak of error; in the succeeding, of the other impediments.

119. Q. What is the annulling impediment proceeding from error? or, what error annuls a marriage?

A. 1° The essential element of marriage, both as a sacrament and as a natural contract, is the *consent* of the parties, by which, of their own free will, and with due knowledge, they agree to be husband and wife. Without this consent there is no contract, no sacrament. Now, it will be readily seen that error, misapprehension, or misunderstanding on a *substantial* point destroys the consent,—the cornerstone of marriage,—and therefore annuls the marriage itself, and that *jure naturae.* We say, *substantial;* for it is plain that a misapprehension in an *accidental* matter may lessen, but does not take away, the consent, and therefore does not, as a rule, invalidate the marriage.

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[1] Cap. 25 de Spons.

[2] Kutschker, l. c. vol. iv. p. 95.

2° Now, according to the law of the Church, and also the law of nature, a misapprehension, in the case of a marriage, is substantial when it affects (*a*) the *person* itself of the contracting party; or (*b*) a *quality* of the person which is almost equivocal to an error as regards the person. These two kinds of error alone annul a marriage, and therefore constitute the diriment impediment of error.

120. Q. What is meant by error with regard to the person?

A. If, for instance, a man believes the woman whom he is marrying to be Rose Smith, whereas in reality she is Anna Jones, he is under a misapprehension with regard to the person; for he intends to marry, not Anna Jones, but Rose Smith. The two women are entirely different persons. This mistake constitutes the *impedimentum erroris*, and that whether the error be antecedent or concomitant, vincible or invincible.[1] It is evident, of course, that such an error can occur but very rarely, and perhaps only when marriage is contracted through a procurator or agent. For, as a rule, the spouses know each other very well, and therefore can scarcely ever be mistaken in regard to each other's person.

121. Q. When does a mistake with regard to the *quality* of a person annul the marriage?

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[1] Feije, l. c. n. 106.

A. Only in three cases, namely: 1° when the quality or state of the person is that of *slavery*, which error constitutes the impediment *servilis conditionis:* of this we shall treat in a separate article; 2° when the quality was made expressly a condition of the marriage consent, in which case there is the impediment of a non-fulfilled stipulation, of which we shall speak below in a separate article; 3° when the quality is substantially equivalent to the person itself.[1] Of this last error alone we shall speak in the present article.

122. Q. When does a misapprehension respecting a quality substantially amount to a mistake in the person itself?

A. We have said that when an error concerning a quality of a person is substantially equivalent to an error regarding the person itself, it annuls the marriage, because of a want of consent in a substantial matter. But the difficult question is, When does an error respecting a quality amount to an error respecting the person itself? Here canonists greatly differ, are confused, and not seldom diametrically opposed to each other.

123. We shall briefly give our view. First of all, an error with regard to a quality or state of a person does not of itself invalidate a marriage, even though the quality be such as to make it highly probable, nay, certain, that the mistaken party would never have contracted the marriage if he had known the quality or condition, v.g., pregnancy caused by another; condemnation to an infamous punishment; low extraction; great poverty. The reason is that the *person*, not his *qualities*, is the direct and principal object of the consent.[2] It is only where the mistaken person intended the quality *principally* and directly—v.g., where a woman intended to marry a nobleman, no matter who he

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[1] Feije, l. c. n. 107.

[2] Ib. n. 109.

was, and had in her mind only a noble person—that the misapprehension becomes equivalent to an error with regard to the person itself, and therefore annuls the marriage.[1]

124. However, general rules do not avail much in this matter. For the mistake is always a question of fact, which depends upon various circumstances existing at the time of the marriage.[2] Practically speaking, there is scarcely ever room for the dissolution of a marriage owing to alleged misapprehension concerning the qualities claimed to be equivalent to an error with respect to the person itself.[3] For the presumption of the law is always in favor of the validity of the marriage already contracted. Consequently the spouse asserting that he was mistaken in such a quality would have to prove, by full canonical proof—such as two competent witnesses, documents, etc.—that (*a*) he was mistaken, (*b*) in such a quality or condition. Now, from what has been said, it is plain that it is exceedingly difficult to prove these facts. Hence the petition for the annulment of a marriage owing to alleged error in the quality redounding upon the person scarcely ever meets with success in ecclesiastical courts, or *in foro externo*.[4]

125. We say, *in foro externo;* for it may really happen that such an error may occur, and that consequently the marriage may be invalid *in foro interno*. Yet there may be no full canonical proof of the error. Consequently the marriage will be regarded valid *in foro externo*. In this case, the party in error should either renew his consent and thus render the marriage valid, or he should obtain a separation from bed and board, or live with the other as brother and sister.

126. Of course, even in the case of an alleged *error personae*, the party alleging this error is obliged to prove it

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[1] Feije, l. c. n. 109

[2] Schulte, Eher. p. 107; Feije, l. c. n. 117.

[3] Feije, l. c.

[4] Bangen, l. c. part. ii. pp. 83, 87.

fully and canonically. For the presumption is always in favor of the validity of the marriage contracted. Hence the *onus probandi* lies upon the one asserting the invalidity. But it is evidently much easier to prove an error which regards the person itself than it is to prove an error which affects only the qualities redounding upon a person.

ART. III.

IMPEDIMENT OF ERROR AS TO SLAVERY.

(*Conditio servilis.*)

127. Q. What is the impediment caused by slavery?

A. By the positive law of the Church, error with regard to slavery annuls marriage. In other words, if a person who is free contracts marriage with one who is a slave, not knowing at the time that the latter is a slave, this error or misapprehension annuls the marriage.[1] We say, *not knowing*, etc.; for if, at the time of the marriage, the slavery of the spouse was known to the other party, there was no error or mistake, and consequently no diminishing or destroying of the consent; hence the marriage was valid. It follows also that when the party in error, having after the marriage discovered his mistake and come to the knowledge of the slavery of the other spouse, nevertheless, by word or deed, v.g., by the *copula*, renews the consent, the impediment caused by the error ceases, and the marriage becomes valid.[2]

128. From this it will be seen that only the party in error can ask for the annulment of the marriage, since he can, after discovering the slavery of the other, consent, and thus render the marriage valid. Moreover, this impediment is established not only by the positive law of the Church, but also by the natural law, and therefore binds unbaptized as well as baptized persons. For nobody is supposed to agree

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[1] Cap. 1 de Conj. serv. (iv. 9).

[2] Cap. 4 de Conj. serv. (iv. 9).

to marry another who is a slave, but whom he believes to be free. Hence also the Church cannot grant a dispensation in such an error, as she cannot supply the consent of the party mistaken.[1]

129. This impediment no longer exists in this country, as slavery is abolished everywhere with us. It is needless to say that the slavery which annuls a marriage is to be taken in a strict sense, and therefore does not mean servants, domestics, etc., who are hired to perform services.[2]

ART. IV.

UNFULFILLED STIPULATIONS.

(*Conditiones appositae.*)

130. Another annulling impediment proceeding from a defect or want of due consent is, as we have indicated already, that of non-fulfilled stipulations made at the time of the marriage. We have seen that an error or misunderstanding which regards merely a *quality* or *state* of a person does not, except in the case of slavery, as a rule annul the marriage. But the case is different when the quality or state is *expressly and distinctly made a condition* of the marriage. For then it is clear that a person who *expressly* makes the stipulation, at the time of the marriage, does not intend to marry the other person except on the stated conditions. Consequently if the stipulated qualities or conditions are not fulfilled, the consent is wanting, and the marriage is invalid.

We shall examine, first, whether it is allowed to contract conditionally; second, what kind of stipulations can be made; third, what is their effect; fourth, how are they proved; fifth, who can ask for the annulment of a marriage on account of non-fulfilled stipulations.

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[1] Schulte, Eher. p. 118.

[2] Feije, l. c. n. 120.

131. Q. Can a person sometimes give his marriage consent conditionally or with certain stipulations, in such a manner that if they are not fulfilled the marriage will be invalid?

A. 1° It is a well-known principle that sacraments, and therefore also marriage, should not be administered conditionally except for grave cause and in case of necessity. Hence the spouses, together with the parish priest and the witnesses, celebrating a marriage conditionally, without sufficient cause, would commit a mortal sin.[1] But neither the sacred canons nor the nature of marriage prohibit marriage from being contracted conditionally when there is sufficient cause, or in case of necessity.[2]

2° The parish priest, in order to avoid grave inconveniences, should never allow parties to contract marriage conditionally, except with the express permission of the bishop.[3]

132. Q. What sort of conditions are allowed?

A. There are three kinds of stipulations: I. Those which are *repugnant to the nature or substance of marriage and its essential rights and duties*, and that whether these conditions are sinful or not. These conditions are reduced to three classes, namely, those which are opposed 1° to *offspring*, v.g., the condition to hinder conception, or not to have children;[4] 2° to *conjugal fidelity*, v.g., the condition to have sexual intercourse with others; 3° to the *sacrament* or the marriage contract itself, that is, to its indissolubility or to its unity, v.g., the condition, "I take thee to be my wife, or husband, in such a manner that the marriage will be dissolved, v.g., for adultery or incompatibility of temper."

None of these kinds of stipulations are to be permitted; and if they are nevertheless made, the marriage contracted with them would be no marriage at all, but would be invalid *ab initio.*[1] For there would be no consent in a marriage as instituted by God and ennobled by Christ.[2]

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[1] Bangen, l. c. part. ii. p. 104.

[2] Arg. cap. 7 de Cond. app. (iv. 5); Soglia-Vecchiotti, vol. iii. p. 120.

[3] Instr. Austr. § 55.

[4] Cap. 7 de Cond. app. (iv. 5).

133. We have said that the stipulations which are contrary to the nature and essential properties of the marriage annul it. Now indissolubility is one of the essential properties of marriage as instituted by God and ennobled by Christ Our Lord. Hence a marriage is invalid which is contracted by the parties thus: "I take thee as my husband (wife) as long as thou art faithful to me." For the condition *as long*, etc., is a stipulation that the marriage shall be dissolved whenever the spouse becomes unfaithful or commits adultery. It is therefore a condition which is repugnant to one of the essential properties of marriage, namely, its indissolubility, and consequently vitiates and annuls the marriage.

134. This or similar conditions involving the dissolubility of the marriage are scarcely ever added by Catholics in their marriages. For they full well know and believe that marriage is indissoluble, and therefore do not think of making such stipulations. But the case is different with Protestants. They generally believe, especially in this country, that marriage is soluble also *quod vinculum*, and that for various reasons, v.g., for adultery, abandonment and wilful desertion, extreme cruelty, imprisonment for life or for a long time, etc. In fact, they generally accept and carry out in practice the secular legislation which grants absolute divorce for the various causes just mentioned.[3]

135. Hence the serious practical question arises: Are the marriages of Protestants, either among each other or with Catholics, invalid because of their general belief that marriage is not indissoluble? With Pope Benedict XIV.[4]

[1] Instr. Austr. § 53.

[2] Bangen, Part. ii. pp. 101, 102.

[3] Wells, p. 79 sq.

[4] De Syn. l. 13, c. 22, n. 3.

we answer, these marriages are valid, except in those cases where the contracting parties *expressly and distinctly stipulate or state,* in the solemnization of the marriage or immediately prior to it, that the marriage shall be soluble, v.g., for adultery. The mere erroneous impression or belief of one or both of the spouses that the marriage is soluble does not vitiate the marriage. For the law of the Church presumes that the spouses, even though under the above erroneous impression, nevertheless had the general will or intention of contracting marriage as instituted by God and ennobled by Christ, and that the individual error of the parties is swallowed up by their general intention of contracting marriage according to the law of God.

136. We have said, *except where the parties expressly stipulate,* etc.; in this case the marriage would be invalid,[1] according to the decree of Pope Gregory IX.: "Si conditiones *contra substantiam* conjugii inserantur, puta si alter dicat alteri: contraho tecum si generationem prolis evites, vel donec inveniam aliam honore vel facultatibus ditiorem, aut si pro quaestu adulterandam te tradas, matrimonialis contractus, quantumque sit favorabilis, caret effectu."[2] For, in this case, the general will of contracting marriage according to the law of God is excluded and extinguished by the erroneous view of the parties as expressly made part of the marriage contract.

137. We say, *in the solemnization,* etc.; in other words, the stipulation as to the solubility of the marriage must be made either at the moment the marriage is contracted, or at least immediately before it. If it is made afterwards, it is no part of the contract, and therefore does not affect its validity. Now, as a matter of fact, the marriage formulas of some Protestant sects contain a stipulation to the effect that the

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[1] Bened. XIV., De Syn. l. 13, c. 22, n. 5, 6, 7.

[2] Cap. *Si Conditiones* 7, de Cond. app. (iv. 5).

marriage shall be soluble,[1] v.g., if one of the spouses commits adultery. This is the case, according to Benedict XIV.,[2] with the marriage formula of the Calvinistic sect. This formula is substantially: "I take thee to be my wife (husband) as long as thou art faithful to me." Of course, where Protestants contract marriage with such a formula, the marriage is invalid. But where the formula contains no such stipulation, the marriage is valid, unless the parties themselves expressly add such a stipulation, either at the time they give their marriage consent or immediately before it.

138. An interesting case was decided by the S. C. C. January 31, 1891. Charles Norman, a distinguished historian and nominally a Catholic, but really a freethinker and atheist, had married Caroline Legrand, according to the rite of the Catholic Church, on April 12, 1887. Both belonged to the diocese of Paris, France. The marriage proved an unhappy one, and the spouses separated a few months after the marriage. The wife, an excellent Catholic, then petitioned the archiepiscopal curia of Paris to declare the marriage invalid on the ground that the husband had contracted the marriage with the condition that it should be soluble. The curia decided that the marriage was null and void. From this decision the *defensor matrimonii* appealed "ex officio" to the S. C. C. Before the S. Congregation it was shown indeed that the husband was a freethinker, and did not believe marriage was or could be indissoluble. But it was not shown that he had contracted the marriage with the express stipulation that it should be soluble. Hence the S. C. C. decided that the marriage was valid, and therefore reversed the decision of the curia of Paris.[3]

139. II. The second class of stipulations are those which

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[1] Leo XIII., Encycl. *Arcanum*, § *Igitur*.

[2] De Syn. l. 13, c. 22, n. 9.

[3] Acta S. Sedis, anno 1891, p. 711 sq.

are not opposed to the substance of the marriage, but yet are (*a*) *sinful*, v.g., "I take thee to wife if thou wilt become a Protestant; or if thou wilt kill or steal;" (*b*) or *impossible*, v.g., the condition, "I will take thee if thou wilt live forever or reach the heavens with thy hands." These conditions are of course never to be allowed; and if they are nevertheless made, they do not annul the marriage, but are simply to be regarded as not made at all.[1]

140. III. The third class of stipulations comprises those which are neither opposed to the substance of marriage *nor sinful* (*conditiones honestae*), and which therefore may sometimes be allowed for sufficient cause. They are subdivided into stipulations concerning something which is (*a*) *past*, (*b*) *present*, or (*c*) *future*. A condition of the *past* is, v.g., I marry you if your parents were noble; of the *present*, v.g., if you are a virgin, rich, or noble; of the *future*, v.g., I marry you if, in three months, I shall obtain the office of magistrate, or if you will, in six months, obtain an inheritance.

141. Conditions which refer to something past or present do not suspend the consent or validity of the marriage; for what is past or present exists or does not exist *hic et nunc*. If it exists, the marriage is valid at once; if it does not exist, the marriage is invalid *ab initio*. Conditions, however, which refer to something future *suspend* the consent and the marriage until the condition is fulfilled. Hence persons who give their consent conditioned on some future event cannot consummate the marriage before the fulfilment of the event; and if they nevertheless do so before that time, the marriage becomes *ipso facto* valid at once. For the presumption *juris et de jure* is that by such consummation they have withdrawn the condition which suspended the marriage.[2] In like manner those who give their consent

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[1] Instr. Austr. § 53; Bangen, l. c. p. 103.

[2] Cap. 3, 5, 6, de Condit. app. (iv. 5).

conditioned on something past or present are bound, before consummating the marriage, to verify the fulfilment or non-fulfilment of the condition. For, if they consummate the marriage before such verification, the presumption *juris et de jure* is that they have withdrawn the condition; and the marriage becomes *ipso facto* valid.[1]

142. Q. How are stipulations proved?

A. The presumption is always that a marriage, once it has been contracted, was validly contracted. Consequently a party who claims that a marriage is invalid owing to non-fulfilled stipulations, and who on that account asks for its annulment, must show, by full canonical proof—v.g., by two unexceptionable witnesses, or by an authentic instrument—that the conditions were really made at the time of the marriage, and that they were subsequently not fulfilled, and that they were not waived by him either expressly or tacitly. Consequently the stipulations are to be *expressly stated* to the parish priest and to the witnesses, and that either immediately before the celebration of the marriage, or in the act itself of the celebration, so that they may be susceptible of being canonically proved.[2] Conditions not so stated are to be considered simply as not made at all,[3] because as a rule they cannot be proved.

143. Q. Who can ask for the annulment of a marriage because of non-fulfilled conditions?

A. Only the spouse who made the conditions, and who did not withdraw them either expressly or tacitly.[4] Hence no one but the spouses themselves can ask for the annulment.

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[1] Cf. Heiss, de Matr. p. 91.

[2] Bangen, l. c. part. ii. pp. 104, 105.

[3] Instr. Austr. § 55.

[4] Ib. § 117.

ART. V.

VIOLENCE AND FEAR.

(*Vis et metus.*)

144. The next annulling impediment caused by a defect in the consent is that of violence and fear. Before all else we must here observe that force or compulsion (*vis*) and fear (*metus*) do not constitute two separate impediments. Both are taken here as correlatives. That is, the impediment in question is called (*a*) constraint (*vis*), inasmuch as the *person inflicting coercion* and thus causing the fear is considered; (*b*) fear (*metus*), in as far as the *person upon whom the compulsion is inflicted*, and in whom consequently fear is produced by this coercion, is regarded. Consequently force and fear, though different in themselves, yet are here taken as *cause* and *effect*, and as forming each an essential and integral ingredient or part of one and the same impediment.[1]

145. Properly speaking, it is fear alone which constitutes the impediment and annuls the marriage, since it hinders or lessens the freedom of the consent. But this fear must be the result of force, moral or physical, as we shall see. Hence the impediment is justly styled that of violence and fear, namely, that of fear produced or caused by violence.

We shall now inquire: 1° Whether and how fear resulting from force or constraint annuls marriage; 2° What sort of fear is required; 3° How and by whom the alleged violence and consequent fear are to be proved; 4° How they are condoned.

146. Q. Whether and how fear resulting from violence annuls a marriage?

A. Marriage, whether considered as a sacrament among

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[1] Feije, l. c. n. 125.

Christians or as a natural contract among unbaptized persons, consists essentially in the consent of the parties. Now a consent must, by its very nature, be given *freely*, that is, without constraint or intimidation. Otherwise it is no consent. This applies particularly to the marriage consent. For marriage is a matter of the greatest importance. It involves a life-long union of the closest and most intimate character. It involves the greatest responsibilities. Consequently it is necessary that the consent given in marriage be entirely free from coercion. Hence, both by the positive law of the Church, and also, most probably, by the natural law, fear caused by violence or intimidation,[1] under certain circumstances, annuls the marriage.[2] In other words, the Church has decreed that the marriage consent given under fear is not a sufficient consent. For it is evident that fear lessens and sometimes totally destroys the liberty of action, and therefore the freedom of consent.

147. Q. What sort of fear annuls the marriage?

A. The fear must be (*a*) *grave*, or of a serious nature; (*b*) inflicted from *without*, or by an external and free cause; (*c*) unjustly; (*d*) for the purpose, at least according to a very probable opinion, of inducing a person to marry a certain other person. We shall briefly touch upon each of these requisites separately.

148. I. *The fear is to be grave.*—It is evident that not every slight fear can suffice to invalidate a marriage. Otherwise the stability of marriages would be completely overthrown. Hence a grave fear is required. But there are various degrees of grave fear. Therefore the question arises: What degree or grade of grave fear is required? We must distinguish between fear produced (*a*) by *absolute* coercion, that is, by physical compulsion which cannot be resisted,

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[1] Feije, l. c. n. 127.

[2] Arg. cap. 12, 14, 15, 21, 28, de Spons. et Matr. (iv. 1).

v.g., if a person with his hands forces another to bow his head as a token of consent; (*b*) and fear which is caused by *relative* intimidation, that is, by constraint which can be resisted, though only with difficulty. Now it is certain that absolute coercion is not necessary. For it would destroy the freedom of consent altogether. Hence relative intimidation, or that which merely lessens but does not destroy the freedom of action, is sufficient.[1]

149. But there are various grades and degrees of relatively grave coercion and consequent fear. What degree, then, of this sort of intimidation, and of the fear produced by it, is required to annul a marriage? The general rule is that the fear produced by relative violence or intimidation should be such as to move and affect a firm and prudent person (*metus cadens in virum constantem*).[2] In other words, the degree of grave fear produced by violence must be such as will, everything considered, that is, considering the nature of the evils threatened or inflicted, the dispositions and habits of the person by whom and upon whom they are inflicted, strongly move a person to marry another.

150. Hence, as the S. C. de P. F. says in the Instr. *Causae matrimoniales* of 1884,[3] three things are to be considered: 1° the person causing the violence and fear; 2° the person suffering it; 3° the nature of the threats or violence used. First, then, the nature or serious character of the violence used is to be considered. Here we observe that some threats or acts of violence or intimidation are of so grave a nature, in themselves, as to produce the greatest fear in the mind of any person whatever. Such are, for instance, threats to kill, to inflict bodily mutilation, or long imprisonment, to disinherit, etc.[4] It is evident that the fear produced by such acts of violence is so great as to destroy the

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[1] Feije, l. c. n. 125.

[2] Arg. Cap. 15, 28, de Spons. et Matr. (iv. 1).

[3] Art. 37.

[4] Schulte, Eher. p. 123.

freedom of consent in any person. Then there are other acts of violence or constraint which, though not in themselves absolutely serious, are nevertheless such as to considerably and strongly influence even firm and prudent persons. Such would be the harsh treatment of a child by its parents, so that living at home becomes very disagreeable.[1]

151. Next, the person who causes the compulsion and the fear resulting from it is to be taken into consideration. It is plain that the threats and ill-treatment of *parents* produce greater effect than those of *outsiders;* that the threats of those parents who are of a *violent*, *irascible*, and *determined* and *unforgiving temper* are more feared than those of *mild*, *easy* parents.

152. Finally, the persons suffering the constraint and fear are to be considered. In other words, their sex, age, education, temper, etc., are to be carefully weighed. For girls are more easily frightened than boys; timorous persons more easily than resolute ones; etc., etc.[2]

153. Besides, the attendant circumstances are to be examined, v.g., whether the party claiming to have suffered from violence had kept company with her whom he afterwards married under alleged fear; whether and why he changed his mind toward her; whether he showed signs of unwillingness before, during, and after the celebration of the marriage.[3] All these things are to be taken into consideration, in order to determine whether the fear was *metus cadens in virum constantem*, that is, such as to *seriously* affect the person in the case, and induce him to marry a certain party.

154. II. *The fear must, secondly, be produced from without*, and that by a *free* cause, that is, by a human being. We say, from *without;* hence fears arising from within one's

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[1] Cf. S. C. de P. F. Instr. *Causae Matr.* § 37. [2] Ib.

[3] Ib. § 38.

own mind, v.g., scruples, no matter how great, do not annul a marriage. We say also *free* cause, namely, by a human being. Consequently fears caused, v.g., by a violent thunder-storm do not affect marriage.

155. It should be observed here that a person may be forced into a marriage, or suffer such fear as to contract marriage, against his will, not only because of force inflicted *upon himself*, but also because of constraint or evils threatened or inflicted upon persons who are related to him, such as parents, brothers and sisters, etc., or who are dear to him by reason of friendship. Hence a marriage contracted under grave fear is invalid, no matter whether the fear was inflicted upon the contracting party himself, or upon others, nearly related to him.[1] Thus, if a person threatens to foreclose a mortgage against a father for the purpose of inducing the latter's daughter to marry him, the fear produced in the girl by such threatened foreclosure may annul the marriage.

156. Neither does it make any difference whether the coercion or threats were employed by *one of the contracting parties*, or by *others*, v.g., by parents, by friends, relatives, or even strangers, without the knowledge or consent of the contracting party. For fear annuls marriage, because it takes away the requisite FULL *freedom of consent.* Hence it matters not by whom the fear was inflicted.[2]

157. III. *The fear should be caused unjustly* (*metus injuste incussus*). In other words, the fear should be the result of *unjust* threats or compulsion. For where the coercion or violence is just, no injury is done, and the party so coerced has nobody to blame but his own reprehensible conduct, which justified the compulsion. The question, therefore, arises: When is the compulsion just, and when is it unjust? Two things are required to justify coercion or intimidation

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[1] Card. Kutschker, l. c. vol. iv. p. 195.

[2] Ib. p. 205.

relative to marriage: 1° The person coerced should be under a *moral obligation to contract the marriage*, v.g., where he has betrayed a girl. 2° The force or constraint should proceed from those *who have a right to use it*, namely, (*a*) from *public officials*, ecclesiastical and secular, in the due exercise of their official duties; (*b*) from *private persons*, v.g., parents, relatives, etc., in certain cases.

158. We will illustrate these two conditions. Peter has promised to marry Rose. He breaks his promise and refuses to marry her. She sues him for breach of promise. The judge gives him the alternative of marrying her or of paying her a large sum of money. He marries her under this alternative. Is the marriage valid? Yes. Why? Because Peter was morally obliged to marry the girl, by his promise. Hence the fear produced in him by the law's alternative was due to his own reprehensible conduct, and was therefore justly inflicted on him.

159. Again, Paul seduces Bertha, or has carnal intercourse with her. She causes him to be arrested for seduction. If convicted, he will be sentenced to imprisonment for a term of years, unless he marries Bertha. In order to avoid this imprisonment he marries the girl, either before or after his conviction. Is the marriage valid? Yes. Why? Because the fear of imprisonment, under which he married Bertha, was due to his own unworthy conduct, and was therefore justly inflicted on him. The ground, therefore, is, that whatever coercion is used by public officials, ecclesiastical and secular—v.g., by bishops, parish priests, secular judges—within their sphere and according to law, is *just*, and due to the reprehensible conduct of the party coerced.

160. Coercion or compulsion used by *private* persons, v.g., parents, relatives, etc., is also just when they have a right to employ it. Thus they can, in the above two cases, threaten to bring Peter and Paul into the courts and have

them fined and punished, and if, under these threats, they consent to the marriage, the latter is valid. For the parents, etc., had a right to go to law, and therefore had also a right to threaten to do so. Hence their threats were not unjust. But where, for instance, the parents or relatives threaten to shoot the seducer, or do him great bodily harm, unless he marries the girl, the fear inspired by such threats would annul the marriage. Because private persons have no right to kill or inflict grave bodily harm, and therefore have no right to threaten to do so.

161. Q. Is it necessary that the force or fear should be inflicted *for the purpose of extorting the marriage consent?*

A. There are two opinions. The affirmative, namely, that the force is to be inflicted for the purpose of extorting the consent to the marriage, is called the *opinio communis* by Feije.[1] The negative, however, which holds that marriage contracted from grave fear, even though not inflicted for the purpose of extorting the marriage consent, is invalid, is termed by Schmalzgrueber[2] the *opinio probabilior.* The reason assigned by Schmalzgrueber is that the law of the Church requires that the matrimonial consent shall be wholly free from unjust fear, and does not make any distinction between fear inflicted for the purpose of forcing the marriage or for some other end.[3]

162. Finally we observe, it must be shown that the person coerced could not easily escape from the compulsion or violence.[4] For if he could, without great difficulty, avoid the constraint, v.g., by having recourse to friends, etc., and yet failed to avoid it, he must attribute the coercion to his own negligence, and therefore is not unjustly treated.[5]

163. Q. How and by whom is the alleged violence and fear to be proved?

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[1] De Imp. n. 134; Card. Kutschker, l. c. vol. iv. p. 205.

[2] Lib. 4, t. 1, n. 398, 399.

[3] Cap. 6, 14, 15, de Spons. et Matr. (iv. 1).

[4] S. C. de P. F., Instr. *Causae Matr.* § 38.

[5] Bangen, ii. p. 94.

A. 1° The presumption of law is always in favor of the validity of a marriage contracted. And justly. For a marriage which has been contracted is a public and solemn fact. Moreover, the stability of a marriage is of the greatest importance. Hence it is always to be considered as valid until the contrary has been proved by full canonical evidence, v.g., by two unexceptionable witnesses, which excludes any reasonable doubt.[1]

2° As in the case of the other impediments, so also in the present case, the *onus probandi* lies upon the one who asserts the impediment. Hence the alleged violence and fear are to be proved by the party who claims to have been coerced and constrained. As to the persons who are the best witnesses to prove the fear and violence, see the Instr. of the S. C. de P. F., *Causae Matrimoniales*, 1884, § 39.

164. Q. Who has the right to petition the ecclesiastical judge for the annulment of the marriage on account of alleged violence or fear?

A. Only the spouse who claims to have been forced into the marriage. Where both spouses have been forced, v.g., by their respective parents, each spouse can petition for the annulment.[2] Third parties cannot ask for the annulment. The reason is that if the couple are willing, either expressly or tacitly, to renew or ratify the consent given under fear, and thus render the marriage valid, they can do so, and no one else has a right to interfere. Nay, as we shall presently see, even the spouse or spouses may lose this right, under certain circumstances.

165. Q. When does the coerced spouse lose the right to petition for the annulment of the marriage claimed to have been contracted under grave fear?

A. 1° According to the general law of the Church, as in force also among us, the marriage contracted under grave fear becomes valid subsequently, not only when the couple *expressly* ratify their consent, but also when they do so *tacitly* or *impliedly*, that is, not only by words, but also by other external signs. Now they renew their consent tacitly, (*a*) when they freely exercise the *copula*; (*b*) or, without the *copula*, live together, of their free will, for a considerable time. Accordingly the law of the Church is, that the marriage contracted under grave fear is subsequently made valid by the fact of the *copula* being exercised by the party forced into the marriage, even though but once, after the coercion has ceased.[1]

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[1] S. C. de P. F., Instr. cit. § 40.

[2] Card. Kutschker, l. c. vol. iv. p. 214.

166. We say, *after the coercion*, etc.; for if the *copula* was rendered under force or fear, it does not, of course, ratify the consent given under fear or violence.[2] Whenever, therefore, the *copula* has spontaneously taken place, even though but once, the law of the Church presumes, or infers from it absolutely, by presumption *juris et de jure*, that the marital consent given under constraint was thus ratified, and that thus the marriage has been rendered perfectly valid. Hence the spouse who claims to have been forced into the marriage loses, by such *copula*, all right whatever to demand the annulment of the marriage.

167. 2° Even where no *copula* has taken place, as above, the fact alone that the spouse coerced has lived with the other spouse for a considerable space of time after the coercion ceased renders their marriage valid, and that by presumption *juris et de jure*.[3] And justly so; for when a person forced into a marriage, subsequently, after the coercion has ceased, nevertheless continues to live with the other spouse, the obvious and only inference is that what was first done under fear was afterwards ratified voluntarily.

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[1] Cap. 28, de Spons. et Matr. (iv. 1); cap. 11, de desp. imp. (iv. 2); cap. 4 Qui Matr. acc. (iv. 18).

[2] Schmalzg. l. 4, t. 1, n. 419.

[3] Cap. 21, de Spons. et Matr. (iv. 1); Schmalzg. l. 4, t. 1, n. 419.

168. We have said, *for a considerable time.* The question therefore arises: How long a space of time of voluntary cohabitation is required in the case? Pope Clement III. (1188) decreed, in a case submitted to him, that a certain spouse or wife who claimed she had been forced to contract the marriage, having lived with her husband for *a year and a half*, had thus ratified the marriage, and had in consequence lost all right whatever to petition for its annulment.[1] Hence it is certain that the cohabitation which lasts *one year and a half* is sufficient.

169. Nay, a shorter term, v.g., six months, may be sufficient. Thus the Instr. Austr. §. 116 says: "Propter coactionem injustam ea tantum pars, cui consensus coactione injusta extortus est, matrimonium accusare potest. Jure suo excidit, quando, postquam metus cessavisset, debitum conjugale voluntarie praestiterit, vel etiam, quin circumstantia ista probari possit, conjugale vitae consortium *per sex menses* voluntarie continuaverit." The reason is that the space of one year and a half, mentioned in the above decretal, is not given as determining the specific length of time of the cohabitation, but simply as a statement of the facts in the case. The determination of the requisite space of time in each particular case is left to the prudent discretion of the judge.[2]

170. From all this it follows that when a spouse forced into a marriage continues to live for a considerable time, v.g., for six months, or a year and a half, with the other spouse, after the coercion has ceased, the law of the Church infers from this fact absolutely (*praesumptio juris et de jure*) that the marriage has been ratified and rendered valid.[3] This absolute and conclusive inference is proper and just. In fact, if persons who have been forced to contract a mar-

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[1] Cap. 21, de Spons. et Matr. (iv. 1).

[2] Schmalzg. l. c. n. 421.

[3] Ib. n. 419.

riage do not afterwards protest or leave the other spouse when they are free to protest or leave, what more natural than to infer that they have thus ratified what they formerly did under compulsion?

Besides, it should be remembered that, of all the impediments, that of fear and force is the one which is most liable to being used by spouses as a pretext for dissolving a marriage of which they have grown tired.[1]

171. However, the question arises here whether this presumption or inference drawn by the law of the Church from the *copula*, or by long-continued living together holds good *also in places where the Tridentine decree* "*Tametsi*" is in force.[2] It is evident that in places where this Tridentine decree does not obtain, the presumption in question holds good in all respects and under all circumstances. For in these places the marriage consent or its renewal or ratification, express or implied, can always be validly given *in a private* manner, that is, without the priest or witnesses. Hence in these places the parties who contracted under fear can and do validly ratify the marriage by *privately* renewing their consent, and that either expressly or tacitly, v.g., by *copula*, or by long cohabitation.

172. But the case appears to be different in places where the Tridentine decree *Tametsi* is in force. For in these places no marriage is valid unless it has been contracted before the parish priest and two witnesses. Consequently it would seem also to follow that where a marriage was invalid, v.g., from fear or error or other defect of consent, it can be rendered valid, in these places where the decree *Tametsi* obtains, only by the express and formal renewal of the consent before the parish priest and two witnesses, and therefore not privately, by express or tacit ratification.

173. Notwithstanding this reasoning, the presumption

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[1] Card. Kutschker, vol. iv. p. 215.

[2] Schmalzg. l. 4, t. 1, n. 420, 421.

above spoken of holds good also in places where the decree *Tametsi* is in force, provided the nullity, or the fact that the marriage was invalidly contracted, under grave fear, is *not publicly known*, or not provable *in foro externo*.[1] If the impediment or nullity is publicly known, the consent must be renewed, in places where the decree *Tametsi* is in force, before the parish priest and two witnesses, so that public scandal may be avoided, and the marriage be provable *in foro externo*.[2] This is the universal practice of the Church, and therefore has the force of law. Hence, also in places where the decree *Tametsi* obtains, parties or spouses may and do ratify their marriage invalidly contracted through fear, if they exercise the *copula*, or continue to dwell together for some time, as explained, provided the nullity of the marriage is not publicly known.

174. In this sense also is to be understood the following enactment of the Instr. Austriaca, § 93: "Matrimonium, quod consensus fictus irritum reddit, consensu ab eo, qui ficte egerat, vere praestito, consolidatum censeatur oportet. Idem obtinet de matrimonio, cui error seu vis metusque obstitit, quamprimum pars, quae errori aut violentiae suberat, recognito errore aut libertate plene recuperata verbo factove assensum suppleverit. Nihilominus ad omne de consensu praestito dubium excludendum his quoque in casibus consultum est, ut conjuges consensum coram parocho et duobus testibus renovent; igitur hoc ut fiat, agendum erit, nisi obversetur prudens scandalorum vel matrimonii in discrimen adducendi metus."

175. Where the proofs are such as to leave a reasonable doubt, or make it reasonably uncertain whether there was grave fear, everything considered, the marriage cannot be pronounced invalid. In this case, when the marriage has

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[1] Gasparri, Tract. Can. de Matr. vol. ii. n. 1144.

[2] Konings, Mor. n. 1630, 1634; Sabetti, Mor., n. 929, sub 3°.

not been consummated, a dispensation *a matrimonio rato et non consummato* may be applied for. Again, it may happen that there was really grave fear, but that this cannot be fully proved *in foro externo*. In this case the marriage would be valid *in foro externo*, but invalid *in foro interno*. Hence, in the case, the marriage cannot be dissolved *in foro externo*, and the party coerced must either consent freely, or obtain a separation *a thoro et mensa*, or live with the other spouse like brother and sister, which latter, however, is very difficult without great danger of sin.

176. Q. Is a marriage contracted from *metus reverentialis*, or from fear of displeasing parents or superiors, sometimes invalid?

A. By *metus reverentialis*[1] is meant that deference or respect for the expressed or declared will of parents and superiors which induces children or inferiors to do or omit something for fear of offending or displeasing them.[2] That a marriage contracted out of fear of displeasing parents and superiors may sometimes be invalid is certain.[3] The only question is: When does this kind of fear annul a marriage? Parents (also uncles, aunts, elder brothers and sisters, guardians and superiors in general) have naturally and justly a great interest in the marriage of their children, and consequently have the right, nay, the duty to advise or dissuade them in their marriage choice. Children, on their part, are bound to pay due deference to the just and reasonable wishes of their parents and superiors. So long, therefore, as these rights of parents and superiors on the one hand, and the respect or deference of children and inferiors on the other, are kept within just and reasonable bounds, the *metus reverentialis* does not, as a rule, annul the marriage.

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[1] This fear springs from the respect or reverence which children or inferiors have for the known or expressed and declared will of parents and superiors; hence it is called reverential or deferential fear.

[2] Santi, l. 4, t. 1, n. 144; Kutschker, vol. iv. p. 207.

[3] Card. Kutschker, vol. iv. p. 207.

177. Hence it may be said that the sole fear of displeasing parents and superiors does not of itself annul a marriage. Thus if, for instance, parents advise their daughter to marry John, and the daughter marries him because she is afraid of displeasing her parents if she refuses to do so, the marriage is *per se* valid. For the mere fear of displeasing parents and superiors is, as a rule, not of so serious a character as to exercise a notable or very strong influence upon children in the matter of their marriage.

178. But there are circumstances under which the fear of displeasing parents and superiors is of itself sufficient to annul a marriage. Thus if, for instance, parents who brook no opposition to their will expressly declare to their daughter or son that they wish her or him to marry a certain person, and if the son or daughter does marry her or him because he or she, knowing the iron and unbending will of the parents,[1] is afraid that by refusing to contract the marriage he or she will incur their *lasting* displeasure and even hatred, the marriage would be invalid, even though no threats, castigation, etc., had been employed on the part of the parents. The reason is that such a displeasure is a grave evil, and the fear of incurring it a grave fear. And it is evident that, in the case, the son or daughter contracted the marriage by the will of the parents rather than by his or her own will.[2]

179. We have said, *even though no threats*, etc., were employed. For, as we have already seen, threats of a serious nature annul a marriage, apart from any *metus reverentialis*, or fear of displeasing parents or superiors. However, it would, as a rule, be difficult to prove that the displeasure of parents was a serious evil, unless they had also used threats, etc.[3]

180. Of course, the burden of proof lies upon the party

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[1] Card. Kutschker, vol. iv. p. 208.

[2] Cap. *Ex litteris*, 11, de desp. imp. (iv. 2).

[3] Gasparri, Tract. Can. Matr. n. 815.

asserting that he contracted the marriage solely out of fear of displeasing his parents or superiors. Moreover, the person thus contracting marriage loses all right to ask for its annulment if he by word or deed—v.g., by the *copula* voluntarily exercised, or by voluntary cohabitation without the *copula*—subsequently ratifies what he had done through deference to the expressed or declared wishes of his parents or superiors.

181. *Observation.*—This impediment cannot be removed by dispensation, since the want of due consent can be supplied only by the person coerced, but by no one else on earth. Again, this impediment affects the marriages of unbaptized persons as well as of baptized ones; for it is also an impediment *juris naturæ.*[1]

ART. VI.

IMPOTENCE

(*Impotentia.*)

182. Marriage, as we have seen, is the consent of a man and a woman to live together for the purpose of bringing forth children, etc. One of the intrinsic and essential ends of marriage is therefore the generation of children. Consequently where this end cannot be realized owing to the fact that the spouses or either of them is impotent, or incapable of performing the *debitum conjugale* or the *copula carnalis* in such a manner as to be sufficient for the generation of children, the marriage is invalid, and that by the very law of nature, and therefore not only among baptized persons, but also among those who are not baptized. This impediment, therefore, does not admit of dispensation by the Church, nor can it be removed by the consent of the spouses.

183. Q. What is the annulling impediment of impotence, and how does it annul marriage?

A. 1° By impotence is here meant, not the inability of actually begetting children (*impotentia generandi*), which exists, v.g., among married people who are very old, and who may nevertheless exercise the *copula perfecta*, but the inability of having such a perfect copulation or coition, as is, of itself, apt or sufficient to generate children.[1] This impotence alone constitutes, under certain conditions which we shall now explain, the annulling impediment.[2]

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[1] Schulte, Eher. p. 131.

184. 2° Accordingly, in order that this inability may annul a marriage already contracted, it must have the following conditions: (*a*) It must *precede* the marriage; in other words, it must exist already at the time of the marriage; otherwise the marriage was valid at the time it was contracted, and therefore does not become invalid by impotence which arises afterwards.[3]

185. (*b*) It is sufficient if the impotence be relative, and it need not be absolute. In other words, the sexual impotence need not be such as to incapacitate a person altogether from having *copula perfecta* with *any* and *all* persons of the opposite sex (*impotentia absoluta*). It is sufficient if it incapacitates a married couple from having the *copula perfecta, ex sese ad generationem prolis apta*, with each other, although they are capable of having it with others. For where impotence exists between two persons of the opposite sex, the intrinsic object of marriage—the generation of children—is unattainable between them, and consequently the fact that they can exercise the *copula* with others does not render their marriage valid.[4]

186. (*c*) It must be *permanent* (*impotentia perpetua*), that is, *incurable*, in such a manner that it cannot be removed without serious danger to life or health. Wherefore that impotence which is merely temporary (*impotentia temporalis*), namely, that which can be removed, v.g., by physicians or surgeons, without seriously endangering life or bodily

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[1] Bangen, l. c. P. ii. p. 106.

[2] Cap. 2, de frig. (iv. 15).

[3] Feije, l. c. n. 539.

[4] Mansella, de Imp. p. 28.

health, does not annul marriage, and the spouses are bound to use the proper medical or surgical treatment to remove it.[1] Of course, when we say *permanent*, we mean as between the two persons afflicted only, not as between others.

187. From the above, then, it follows that the impotence which exists already at the time when the marriage was contracted, and is incurable as between the married couple, annuls marriage *ex jure naturae*, and that whether the impotence is on the part of the man or on the part of the woman, whether it be congenital and organic or produced by accidental causes.[2]

188. It will be seen, therefore, that the same impotence which annuls a marriage *already contracted* also prohibits, according to the general opinion of theologians and canonists, the respective parties affected by impotence from marrying, and that either altogether, where the impotence is absolute, or only with certain persons, where it is merely relative.[3]

189. Q. Who has the right to ask for the annulment of the marriage (*accusatio matrimonii*) on account of alleged impotence?

A. Only the married couple; because the impotence is, by its very nature, as a rule, occult and known only to the spouses, and because they may live together as brother and sister, provided they can do so without danger of incontinence, or also because they may live entirely apart from each other. Thus the S. C. de P. F.[4] says: "Ad impugnandum ex capite impotentiae matrimonium *solummodo conjuges* admittuntur, quia ipsis solummodo hoc factum cognitum esse potest, et ipsi tantummodo de hac re solliciti esse debent." It should be noted, however, that both spouses, that is, the *pars impotens* as well as the *pars potens*, can ask for the annulment.[5]

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[1] Bangen, P. ii. p. 107.

[2] Feije, l. c. n. 539.

[3] Bangen, P. ii. p. 117.

[4] Instr. *Causae Matr.* 1884, § 46.

[5] Feije, l. c. n. 541.

190. Q. Whether and by whom is the alleged impotence to be proved?

A. 1° The asserted impotence must be established by full canonical proof, v.g., by ocular inspection on the part of experts, witnesses, etc. For a marriage once contracted in due form is to be regarded as valid until its invalidity is fully proved. Hence the mere assertions, even though under oath, of the married couple are not sufficient.[1]

2° The *onus probandi* lies upon the party who asserts that the impotence exists, and who, on that account, asks that the marriage be juridically declared invalid.

191. Q. How is impotence to be proved?

A. The manner in which impotence is proved is peculiar and adapted to the nature of the impediment. It is plain that the best and surest way of proving the alleged impotence is by the inspection, on the part of physicians or midwives, of the sexual organs of the man and woman said to be impotent. Hence also the mode of proving impotence, as outlined by the S. C. S. O.,[2] and as enjoined by the S. C. de Prop. Fide,[3] is the following:

192. First, as in all other impediments, the spouse who asks for the annulment is examined; next, the other spouse is also examined;[4] then the witnesses are examined as follows: first those produced by the plaintiff spouse; then those offered by the defendant. Parents, relatives, friends, and neighbors are to be preferred as witnesses to strangers. After all the witnesses have been examined under oath and separately, two[5] good physicians are to examine the sexual organs of the man, and two midwives

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[1] Instr. Austr. § 174; Feije, l. c. n. 541.

[2] Instr. in our Elements, vol ii. p. 441.

[3] Instr. *Causae Matr.* 1884, § 46.

[4] Instr. S. C. S. O.

[5] Where it is difficult to have two physicians or two midwives, one physician for the husband and one midwife for the wife is sufficient, as we shall see further on (S. C. S. O., 20 Junii, 1883, apud Gasparri, vol. ii. p. 576).

those of the woman; and they are to set forth the result of their examination in writing and under oath.[1] Neither the judge, nor the *defensor matrimonii*, nor the secretary goes to the place where the inspection occurs.[2]

193. When, from all this evidence, it becomes morally certain that there is complete and incurable impotence between the two spouses, and that it existed prior to their marriage, the marriage should be pronounced invalid. But if a reasonable doubt remains as to whether there is impotence at all, or whether it is incurable, the triennial experiment should take place, at least according to the older discipline. If, after cohabiting for three years, the spouses still claim that there is impotence, the ecclesiastical judge should again order the examination of the sexual organs, as above stated. And if after that there still remains a reasonable doubt, he should either pronounce in favor of the validity of the marriage or, what is better, send the whole testimony to the Holy See, with us, to the S. C. de Prop. Fide, for decision.[3] But if, after the triennial experiment, the spouses do not renew their request for the annulment of the marriage, nothing should be done by the ecclesiastical judge.[4]

194. We say, *at least according to the older discipline.*[5] For the triennial experiment seems to have gone out of use at the present day. Gasparri[6] states that the Sacred Congregation *Concilii* no longer requires it, and has not ordered it since the year 1817. Neither does any mention whatever of it occur in the Instruction of the S. C. C. 1840, of the S. C. S. O., or of the S. C. de Prop. Fide, 1884.

Consequently, in alleged impotency or non-consummation of marriage, the proofs consist at the present day of (*a*) the sworn testimony, or rather deposition, of the spouses themselves and of (*b*) the witnesses on both sides; (*c*) the ocular inspection or examination of the bodies of both spouses, except where it is entirely useless or impossible.[1] Afterwards the whole proceedings are published to both parties, to enable them to prepare their summing up.

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[1] Instr. S. C. S. O. cit.

[2] Cf. Gasparri, n. 1198, note 1.

[3] Instr. S. C. S. O.

[4] Feije, l. c. n. 545.

[5] Cap. 5, de frigid.

[6] Tract. Can. de Matr. vol. ii. n. 1197.

195. From all this it will be seen that the spouse alleging the impotence must fully and canonically prove three things: (*a*) that there exists real impotence on the part either of the man or of the woman; (*b*) that it existed already at the time of the marriage; (*c*) that it cannot be cured without grave danger to life or bodily health. If any of these facts is not fully proved beyond a reasonable doubt, the marriage cannot be annulled. Thus the Instr. Austr. § 174 says: "Quodsi dubium remaneat an impotentia insanabilis existat et matrimonium antecesserit, rejicienda est declarandae invaliditatis petitio." But in this case, if the spouses have really not consummated the marriage in the full sense of the term, they can ask the Holy See for a dispensation from a marriage which is valid indeed, but not consummated (*a matrimonio rato et non consummato*). Of course, they would then be obliged to prove, by full canonical proof, that they did not consummate their marriage.

ART. VII.

DISSOLUTION OF A MARRIAGE WHICH IS "RATUM" BUT NOT "CONSUMMATUM."

196. The right to demand the dissolution of a marriage because of its non-consummation belongs exclusively to the spouses; and hence these causes may fitly be called matrimonial causes *juris privati.* Consequently their discussion may properly follow here.

We have seen that a marriage among Christians which is valid, indeed, but not yet consummated, can be dissolved by dispensation of the Pope. We shall here confine ourselves to the procedure peculiar to this dissolution.

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[1] Gasparri, l. c. n. 1198.

The mode of proceeding when there is question of dissolving a marriage which has been contracted validly, that is, without any diriment impediment whatever, but has not been consummated, is, in most parts, similar to that observed in the case of claimed impotency.

197. Consequently the first step is the presenting of the bill (*libellus*) praying for the dissolution of the marriage. This *libellus* is nothing else than the petition of the spouse or spouses asking that a dispensation be granted from the non-consummated marriage. The right of making this demand belongs solely and exclusively to the husband and the wife, or to either of them.[1] Consequently it is to be signed by the petitioner in person. It is to be addressed to the Sovereign Pontiff, since he alone can grant a dispensation from a valid but not consummated marriage. It should set forth distinctly and fully all the facts tending to show the non-consummation, and the existence of sufficient causes for the desired dispensation.

198. The petitioner may send his petition directly to Rome, although it will be much better, and save delay, if he asks his ordinary to forward it for him. Before sending it to Rome, the bishop will do well if he examines, in a summary and extrajudicial manner, into the truth of the facts and statements contained in the petition. If he finds that they are not based upon probable proofs, he should advise the petitioner to let the whole matter drop. But if he finds that there is *prima facie* proof or half-proof of the claimed non-consummation, he should endorse the petition, and state in his letter to the Holy See that there seems to be probable proof of the non-consummation, etc.[2] The ordinary then

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[1] Gasparri, l. c. 1181.

[2] Ib. l. c. n. 1192.

forwards the petition and his views thereon to the Holy See —with us, to the S. C. de Prop. Fide.

199. The Sacred Congregation, after receiving these letters, if it concludes that there is sufficient probable *prima facie* proof of the non-consummation, writes to the bishop, authorizing him to institute a canonical trial, and to transmit at its close all the acts, etc., to Rome.

200. Upon receipt of this rescript the bishop begins the canonical trial, which has for its object to prove canonically two things: (*a*) the claimed non-consummation of the marriage; (*b*) the causes or reasons why the dispensation should be granted. For, unless it is fully and juridically proven during this trial that the marriage was not consummated, and that, besides the non-consummation, there are very grave reasons for the dissolution of the marriage—v.g., great and irreconcilable aversion or enmity between the spouses—the dispensation will not be granted by the Pontiff.[1]

201. The trial itself is nearly the same as that employed in the case of claimed impotency, and, with the exception of the corporal inspection, resembles the matrimonial process in causes of nullity. Consequently the main parts of the trial are as follows: First comes the examination of the spouses themselves, as set forth in the Instr. *Causae Matrimoniales*, § 17 sq.[2] Next, the witnesses produced on both sides or by both spouses are examined, separately, under oath, etc. Then follows the examination of the bodies of both spouses. The inspection of the husband is made by two physicians; that of the wife by two midwives or, where custom has it, by two physicians.

202. Where it is difficult or impossible to have *two* physicians and *two* midwives, it will be sufficient to employ one physician to examine the husband, and one midwife the wife.

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[1] Our Elements, vol. ii. n. 1476.

[2] Cf. Instr. S. C. de P. F. *Causae Matr.* § 46; Instr. S. C. S. O., in our Elements, vol. ii. n. 1638 sq.

Thus the Instr. S. C. S. O., June 20, 1883, for matrimonial causes, says, under art. 49: "Quod si ob singulares locorum circumstantias impossibile aut valde difficile aliquando fuerit, ut duo medici periti, et duae obstetrices item peritae reperiantur, tolerari poterit, ut *unus tantum medicus et una obstetrix* adhibeatur. Curandum tamen in hoc casu, ut relationes utriusque examinandae subjiciantur duobus aliis medica et chirurgica scientia doctis ibidem vel alibi commorantibus, ut fide jurata judicium suum super eas proferant, num scilicet iisdem sit fidendum, et num ipsae exhibeant motiva, quae sententiae ferendae solido fundamento sint."

203. After this, when all the available testimony has been collected, the entire proceedings and acts are published to both spouses or parties, as laid down by the Instr. *Causae Matr.* § 22.[1]

204. When all this has been done, the bishop should, without delay, send the entire acts and proceedings of the trial to the Holy See (with us, to the S. C. de Prop. Fide). The final summing up, in the case, is made before the Sacred Congregation, not before the ordinary. Of course, the ordinary or the moderator of the matrimonial court has no power to pronounce sentence, that is, to declare whether the marriage was consummated or not. The Holy See alone gives the decision.[2]

205. The Sacred Congregation, upon receiving the acts, usually appoints two consultors to examine them carefully and report the result to the S. Congregation. Likewise access to the acts is also given to the advocates appointed by the spouses, and to the Roman *defensor matrimonii*, each of whom presents a summing up to the Sacred Congregation. Afterwards the whole cause is discussed and decided in the full congregation of cardinals, under the following

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[1] Gasparri, l. c. n. 1197.

[2] S. C. S. O. Instr. cit. in our Elements, vol. ii. n. 1649; Gasparri, l. c. n. 1167, 1199.

question: "An sit consulendum SSm̃o pro dispensatione super matrimonio rato et non consummato in casu?" The decision is given in the words *affirmative* or *negative*, according as the Sacred Congregation considers the non-consummation proved or not proved.

206. We observe here that matrimonial causes of nullity appealed to the S. C. de P. Fide, or brought before it in the first instance, are frequently referred by it to the S. C. C., or also, especially when one of the parties is a non-Catholic, to the S. C. S. O.[1]

CHAPTER III.

DIRIMENT IMPEDIMENTS "JURIS PUBLICI."

207. HAVING treated of the impediments which are *juris privati*, we come now to those which are *juris publici*. They have been enumerated above (n. 105). We shall now discuss them briefly one by one.

ART. I.

WANT OF PROPER AGE.

(*Impedimentum aetatis.*)

208. From the very nature of marriage, it is plain that a person, man or woman, must be old enough (*a*) to possess sufficient bodily vigor and capacity to perform the *copula maritalis* perfectly, i.e., in such a way as to be *apta ad generationem prolis*, and also (*b*) to have sufficient intelligence to understand the nature and duties of matrimony. For nobody can validly agree to perform something which he is unable to perform or which he does not understand. Hence, by the very law of nature, all persons whatever,

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[1] Gasparri, l. c. vol. ii. pp. 338, 339.

unbaptized as well as baptized, are incapacitated from contracting marriage validly until they are old enough to be physically able to render the conjugal debt (*debitum conjugale*) perfectly, and to understand properly the obligations of the married state.[1]

209. But the law of nature does not specify at what particular age persons begin to possess these requisites. Hence, according to this law, persons can validly marry at any age, provided they have the above qualifications of body and mind. However, from the general experience of mankind, it has been found that men usually attain to those conditions at the age of 14 complete, and women at the age of 12 complete. Hence this age is called that of puberty.

210. Accordingly, the law of the Church, following the Roman or civil law, presumes that persons do not possess the above requisites until they reach the above age, namely, 14 for males and 12 for females.[2] Hence it decrees that marriage cannot be validly contracted between males under 14 and females under 12; and that if it is nevertheless contracted, it is invalid, except in the case where *malitia supplet aetatem*, that is, where the parties, notwithstanding their being under the above age, yet really do possess the requisite corporal strength and capacity to consummate the marriage, and also have sufficient intelligence to comprehend the nature and obligations, v.g., the indissolubility, etc., of the married state.[3]

211. We say, *except in the case*, etc.; for it may happen exceptionally that parties do really possess the conditions referred to before they are respectively 12 and 14 years old. But the presumption of the law is against them. And consequently, until they fully and canonically prove that in their case precociousness makes up for the want of

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[1] Mansella, l. c. p. 22.

[2] Cap. 6, 10, 11, de desp. Imp. (iv. 2); Bangen, l. c. p. 120.

[3] Bened. XIV., const. *Magnae Nobis*, 8 Junii 1748; Feije, l. c. n. 531.

age (*malitia supplet aetatem*), their marriage is presumed invalid *in foro externo.* Where they prove this, the marriage must be regarded as valid, also *in foro externo;* because the presumption then gives way to the reality or to facts.

212. Q. What is the mode of procedure in regard to this impediment?

A. 1° The celebration of marriage between males under 14 and females under 12 is strictly forbidden, except where the parties fully prove that, notwithstanding their being under the above age, they possess the requisite bodily vigor and mental capacity. The bishop alone, or the Holy See, has the right to decide whether the proofs are sufficient. In case of doubt, recourse to the Holy See is the safest course. Hence, persons under the above age can marry only with the express permission of the bishop or of the Holy See. Accordingly the Instr. Austr. § 17 justly decrees: "Quum pueri, qui decimum quartum, et puellae, quae duodecimum aetatis annum nondum absolverint, de regula neque physice ad matrimonium apti, neque ii sint, qui matrimonii contrahendi vim, prout decet, intelligant, de jure ad matrimonium inhabiles censentur. Quodsi autem unquam eveniret, ut hac aetate minores et physica et morali ad matrimonium aptitudine pollerent, nihilominus, nisi desuper ab episcopo dioecesano vel ab ipsa Apostolica Sede sententiam declaratoriam obtinuerint, matrimonio jungi non possent."

213. 2° Where persons under the above age have nevertheless contracted marriage without having previously obtained the express permission of the bishop or the Holy See, their marriage is to be regarded as invalid *in foro externo,* and they are to be separated until they have proved that at the time of their marriage they already possessed the two conditions referred to.[1] In annulling such a marriage, the judge proceeds in a very simple manner. In

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[1] Bangen, l. c. p. 120.

other marriages the presumption is in favor of their validity; but in this case the presumption is the other way. Hence, where it is certain that the parties are under the above age, the marriage should be declared null forthwith. No petition for the annulment (*accusatio matrimonii*) is needed, and no process. For the marriage is presumed not to exist at all. Now it is not necessary to petition for the annulment of what does not exist.[1]

214. We observe that this impediment scarcely ever occurs at the present day. For, as in other countries, so also in the United States, the secular law generally forbids the marriage of males under 21 and of females under 18, save with the consent of their parents or guardians.

215. Here it is proper to remark that the age respectively of 12 and 14 is the lowest fixed by the law of the Church for validly contracting a marriage. We say, *for validly*, etc.; for, in fixing this age, the law does not intend to convey the idea that this early age is also the convenient and proper age for marriage. That age is determined for the *validity*, not the *propriety*, of the marriage. In fact, as a rule, it is not expedient that marriage should be contracted at that early age, when the bodily and mental faculties and powers are, as a rule, not sufficiently developed to enable people to assume the onerous obligations of the married state. Hence it is the universal custom for men not to marry before the age of 21, and for women not before 18. Not unfrequently it is better for them to wait longer, though in the case of women, not beyond the age of 24, and in the case of men, not beyond 30.[2] Accordingly the Instr. Austr. § 72 appropriately says: "Procurandum est, ut avertantur matrimonia eorum, qui annum quidem decimum quartum et respective duodecimum absolverunt, ast nondum attigerunt aetatem, qua pro terrae

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[1] Cap. 13, de desp. Imp. (iv. 2).

[2] Gasparri, l. c. n. 493, 496, 777.

gentisque ratione aptitudo ad matrimonium debita cum deliberatione ineundum et maturitas physica adesse solet."

ART. II.

PRIOR MARRIAGE.

(*Impedimentum ligaminis.*)

216. We have seen that, both by the natural law and the positive law, marriage is an *indissoluble* union, i.e., a union *for life*, between one man and one woman. Hence it is forbidden for one man to have two or more wives, or for one woman to have two or more husbands, at the same time. Consequently a person who is validly married cannot validly marry again so long as the prior marriage still exists; and if, nevertheless, he marries a second time while the first marriage still exists, his second marriage is invalid, and he must be compelled to return to the spouse of the first marriage.[1]

217. Q. What, then, is the diriment impediment called *ligaminis* or bond of a prior marriage?

A. It is the existence and continuance of a prior marriage validly contracted. Two things, as will be seen, are required to constitute this impediment: 1° that the prior marriage contracted be *valid;* 2° that it still exist. We say *valid;* for when a marriage is contracted invalidly, that is, with a diriment impediment, it is plain that no *ligamen* or bond arises from it. Yet it should be observed, as we have already seen, that when a marriage has been once contracted *in due form*, that is, in the manner prescribed by the law of the Church, the presumption is always that it has also been validly contracted, that is, without any diriment impediment. Hence a person who alleges an impediment against it must fully prove it.

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[1] Cap. 3, 5, de Sponsa duor. (iv. 4); cap. 2, de sec. nuptiis (iv. 21).

218. We say, also, *that it still exist.* Now a marriage, when validly contracted, ceases to exist only by the death of one of the contracting parties. However, among baptized persons, a marriage which is valid, indeed, *but not yet consummated*, also ceases to exist by papal dispensation *a matrimonio rato et non consummato*, and by the solemn vows made by one of the spouses in a religious order.

219. Q. Does the impediment of an existing marriage (*imped. ligaminis*) bind unbaptized as well as baptized persons?

A. Yes. For, as we have seen, marriage, as instituted by God Himself in paradise, is indissoluble, that is, endures *for life.* Hence this impediment of an existing marriage is of divine and natural law, and therefore binds all men, baptized and unbaptized. Consequently a marriage validly contracted between two infidels, that is, unbaptized persons, v.g., Jews, Turks, or unbaptized Protestants, cannot, as a rule, be dissolved except by the death of one of the parties. We say *validly contracted;* that is, contracted without any diriment impediment. Now unbaptized persons are bound only by the impediments of the natural and the divine positive law, but not by those of the positive ecclesiastical law.

220. We say, moreover, *as a rule;* for there is one, though only one, exception, namely, where, of two unbaptized persons married while unbaptized, one becomes converted to the true faith and is baptized, and the other remains unconverted and refuses to remain with the converted party *sine contumelia creatoris:* in this case, the converted spouse can contract marriage with a Catholic, and the former marriage becomes dissolved by the latter.

221. From what has been said it follows that the Church cannot grant a dispensation from the impediment of an existing marriage. For she cannot dispense from the natural and divine positive law.

222. Q. What is the mode of procedure when the exist-

ence of a prior marriage is alleged as against the validity of a subsequent one?

A. We have seen that it is absolutely forbidden, by divine, natural, and positive ecclesiastical law, for any person who is bound by a marriage still existing to contract a new marriage. Yet it will not unfrequently happen, even among Catholics, that spouses already validly married will contract a new marriage while their former marriage still exists. Sometimes it is done from error, v.g., where one spouse erroneously thinks that the other is dead; sometimes it is done maliciously. What is the mode of procedure in these cases of dual marriages? It is necessary to distinguish between three cases: 1° Where the prior marriage or the first of the two marriages was contracted by Catholics, in the manner provided or sanctioned by the Church; 2° Where it was contracted by baptized Protestants, according to the ritual of their sect, and afterwards annulled either by the ecclesiastical tribunal of their sects or by the civil tribunal; 3° Where it was contracted among unbaptized persons, and afterwards annulled by the civil tribunal or by an heretical ecclesiastical tribunal. We shall discuss each case separately.

223. As to the first case, the marriage of all baptized persons, and therefore also of Catholics, when validly contracted and consummated, can, as we have shown, be dissolved or cease to exist only by the death of one of the two spouses. Hence the ecclesiastical judge cannot pronounce the dissolution or cessation of such a marriage until there exists a *certus nuntius*, that is, a *moral certainty*, established by canonical proofs, of the death of one of the married couple.[1] In other words, the ecclesiastical judge must uphold the existence and validity of the first marriage, until the death of one of the married couple is *proved*, and that juridically.[2]

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[1] Cap. 19, de Spons. et Matr. (iv. 1).

[2] S. C. de P. F. Instr. *Causae Matr.* § 42.

224. Now, what kind of proof is needed? The death of one of the spouses is a *fact*, and is therefore to be established or proved in the same manner as other facts, namely, by documents, witnesses, presumptions, etc. The mere affirmation or oath of the surviving party or of the one trying to establish the alleged death is no proof, particularly considering the interest he or she has at stake.[1] Moreover, the proofs must be such as to establish a *moral certainty* of the claimed death, and therefore to exclude *all reasonable doubt to the contrary*. Consequently, as long as there remains a reasonable doubt of the claimed death, the judge must sustain the first marriage and pronounce against the second. But where the proofs are such as to make it morally certain and leave no reasonable doubt that the spouse was dead before the second marriage was contracted, the judge cannot pronounce the second marriage invalid.[2]

225. We have said that the proofs are to be such as to produce a moral certainty, not merely a probability, of the claimed death. Now there are two kinds of canonical proofs: (*a*) those which are perfect, v.g., an authentic certificate of death; or two eye-witnesses who saw the person when dead; (*b*) those which are imperfect, v.g., one eye-witness; presumptions, inferences, etc. Perfect proofs produce a *moral* certainty amounting almost to an *absolute* certainty. It is sometimes very difficult, nay, impossible, to procure such proofs in cases of alleged death. Hence the law of the Church admits in the present case of less perfect proofs, v.g., presumptions, inferences, or what is usually termed circumstantial evidence. For such circumstantial evidence may sometimes produce a moral certainty, sufficient in the case.

226. Consequently the proofs sufficient to establish a moral certainty of the death of the spouse are as follows:[3]

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[1] Schulte, Eher. p. 205.

[2] S. C. de P. F. Instr. cit. § 43.

[3] S. C. S. O. Instr. ad prob. obitum, in Conc. Pl. Balt. III. p. 258.

1° An authentic certificate of death is the best proof; 2° If that cannot be had, two eye-witnesses who saw the person when dead, and who are trustworthy and depose under oath, constitute full proof;[1] 3° In default of these, *one* direct, sworn, and trustworthy witness may suffice, if corroborated by circumstantial evidence; 4° If no direct witnesses can be obtained, hearsay and other indirect witnesses, corroborated by strong presumptions, may suffice; 5° If no witnesses at all can be had, then violent presumptions based upon strong indications of death, v.g., the absence for twenty years of a person who is old, infirm, etc.[2] When by means of these proofs a moral certainty of the claimed death is established, the ecclesiastical judge can declare the first marriage dissolved and the second marriage valid; otherwise not.

227. Where in the case of a dual marriage it is claimed that the first marriage should be declared invalid or dissolved, not because of the alleged death of one of the spouses, but because it was contracted with a diriment impediment, the person asserting the existence of such an impediment must fully prove it. For the presumption is always in favor of the validity of a marriage which has been contracted. If the alleged impediment is not fully proved, the first marriage must be sustained and the second invalidated.[3] We pass now to the second case.

228. Q. What is the mode of procedure in the second case, namely, when the existence of a prior marriage, contracted between *baptized non-Catholics*, is alleged as against the validity of a subsequent one?

A. We premise: The marriages of Protestants come, practically speaking, before the forum of the Church, chiefly in two ways: (*a*) when Protestants become converted to the Catholic Church; (*b*) when a Protestant wishes to marry a Catholic.

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[1] S. C. de P. F. Instr. *Causae Matr.* § 42.

[2] S. C. de P. F. Instr. cit. § 43.

[3] Kutschker, l. c. vol. iii. pp. 223, 224.

We now answer: All baptized persons, and consequently all Protestants who are validly baptized or presumed to be validly baptized, are bound by the diriment impediments, not only of the natural and divine positive law, but also by those of the purely positive laws of the Catholic Church. Consequently the marriages of Protestants are dissolved, like those of Catholics, only by the death of one of the parties, or because they were contracted with an annulling impediment recognized by the Catholic Church. Hence, in the case of a dual marriage among them, or between them and Catholics, the first marriage must be regarded as valid and the second as invalid until it is proved that one of the spouses of the first marriage was dead at the time the second was contracted, or that a diriment impediment recognized by the Church stood in the way of the first marriage. For, in the case of Protestants as well as of Catholics, the presumption is always in favor of the validity and continuance of the first marriage.

229. Q. What is the mode of procedure in the third case, namely, in the case of a dual marriage contracted among *unbaptized persons?*

A. We premise: The marriages among unbaptized persons may be brought to the cognizance of the Catholic ecclesiastical judge chiefly in two cases: (*a*) when these unbaptized persons are converted to the Catholic Church, or (*b*) when they wish to marry a Catholic.

We now answer: Unbaptized persons contract, as we have seen, all the diriment impediments of the natural and the divine positive law, but not those of the positive law of the Catholic Church. Consequently the marriages of unbaptized persons can be declared dissolved only by the death of one of the spouses, or because they were contracted with an annulling impediment of the natural and divine positive law.

230. Hence, in the case of a dual marriage among them, the first marriage must, except in one case to be presently explained, be held to be valid and the second invalid until it is proved (*a*) that one of the married couple of the first marriage was dead at the time the second marriage was contracted, (*b*) or that a diriment impediment of the natural or positive divine law stood in the way of the first marriage. We say, *until it is proved*, etc.; hence, if a reasonable doubt remains on either of these points, the first marriage must be regarded as valid; because the presumption is in its favor.[1]

231. We have also said, *except in one case;* namely, where one of the married couple becomes converted and is baptized, and the other remains unbaptized and moreover refuses to continue in the marriage *sine contumelia creatoris.* In this case, the converted spouse can, upon having established as certain, by due interpellation, the unwillingness of the unbaptized spouse to continue the marriage without contumely to the Creator, marry a baptized person, and then the first marriage becomes annulled by the fact of the second marriage.[2]

232. Q. By whom and how can and should the *accusatio matrimonii*, i.e., the judicial petition for the annulment of the marriage, be made in the case of a dual marriage?

A. The impediment *ligaminis*, or of an existing prior marriage, as alleged against the validity of a subsequent one, is, as we have seen, *juris divini*, and of such a nature that it cannot be removed by the mere consent of the contracting parties. It is therefore also *juris publici*. Consequently the episcopal Curia *can*, and sometimes—v.g., when the matter is brought to its notice by notoriety, denunciation, etc.—*should*, proceed *ex officio* against the second marriage.[3] In this case the fiscal procurator, or another person specially appointed by the *Curia*, makes the judicial petition for the annulment of the second marriage, on the ground of the existence of a prior marriage.

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[1] Cf. S. C. de P. F. Instr. *Causae Matr.* § 45.

[2] Mansella, l. c. p. 104.

[3] Kutschker, l. c. vol. iii. pp. 221, 225.

233. Against this petition the defendant spouse of the second marriage may set up three defences: 1° That the spouse of the first marriage is indeed still alive, but that the first marriage was invalid by reason of a diriment impediment; 2° That the first marriage was indeed valid, and that the spouse was indeed alive at the time the second marriage was contracted, but has died since then; 3° That the first spouse died before the second marriage was contracted.

234. The first defence is equivalent to a petition for the annulment of the first marriage. Hence the ecclesiastical judge should proceed to test the validity of the first marriage, and the *defensor matrimonii* should defend the *first* marriage, not the second.[1]

235. In regard to the second defence, if it is shown to be true that the spouse really died, and that thus the first marriage became dissolved during the existence of the second, then the second marriage can be contested, or its annulment demanded, not by the Curia *ex officio*, but only by the spouse who was not cognizant, at the time he or she contracted the second marriage, of the existence of the prior marriage.[2] The Curia can proceed *ex officio*, in this case, only when both spouses were aware of the prior marriage.[3] The reason is that the spouse who was inculpably ignorant of the first marriage has the right to demand that the other spouse, who knew of it, should render the marriage valid. The former consent would not be sufficient. The consent would have to be given anew by both spouses.[4]

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[1] Kutschker, l. c. pp. 223, 224.

[2] Cap. 1, de eo qui duxit (iv. 7).

[3] Instr. Austr. § 121; Kutschker, vol. iii. pp. 222, 223.

[4] Feije, l. c. n. 446.

236. The third case is also tantamount to a petition to declare the first marriage dissolved because of the alleged death of the spouse. Hence the *defensor matrimonii* should, in the case, defend the *first* marriage, not the second. He should therefore seek to show that the proofs adduced for the alleged death are not such as to give a moral certainty of the death.[1]

237. Finally, it may happen that, in the case of a dual marriage, the first marriage is not publicly known, and that at the same time it is morally certain, even though from mere extrajudicial proofs, that the first spouse was dead at the time the second marriage was contracted. Is it necessary, in this case, always to have recourse to a judicial process, and to a declaration *in foro externo?* No. If the parties in the case are content with having their second marriage regarded as valid *in foro interno* and do not ask it to be recognized *in foro externo*, it is sufficient for the bishop, to whom the case should be referred by the confessor of the parties, to declare, without any judicial procedure, that, *pro solo foro interno*, the cessation of the first marriage and the consequent validity of the second are sufficiently verified; that therefore the parties may continue in the second marriage, and may be admitted to the sacraments, provided they are disposed to conform to the law of the Church, if the case should be brought before the *forum externum*, v.g., by publicity, or denunciation, etc.[2]

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[1] Kutschker, l. c. pp. 224, 225.

[2] Bangen, l. c. P. ii. pp. 128, 129.

ART. III.

THE ANNULLING IMPEDIMENT ARISING FROM RELATIONSHIP BY BLOOD.

(*Cognatio naturalis, seu consanguinitas.*)

particularly in,
the [illegible] still

238. Among all nations and at all times there has existed and still exists a deep aversion against marriages between persons who are closely united to one another by ties of consanguinity or affinity. In fact, there is and always was a wide-spread feeling among men that such marriages frequently result in death, moral depravity, deformity, or even total absence of offspring.[1] This feeling, being common to all, has evidently been implanted in the human heart by the Creator Himself. And indeed there are many reasons why marriages should not be contracted between persons thus closely united to each other. For, who does not see that concupiscence or carnal lust would be left without any efficient restraint if marriage were allowed or were valid between persons who are constantly living together under the same roof, or united by the ties of the closest familiarity? Again, is it not apparent that the conjugal act seems repugnant to that mutual love, respect, and modesty which arise from close relationship? Moreover, if the marriages in question were allowed, each family, with its various ramifications, would naturally tend to become so exclusive as to be almost completely separated and shut off from other families.[2]

239. Q. How many kinds of relationships are there which annul marriage?

A. These: 1° *Natural* or carnal relationship, arising from blood, and called consanguinity; 2° *Legal* relationship, called adoption; 3° *Spiritual* relationship, arising from baptism and confirmation; 4° Relationship by marriage, called affinity; 5° The relationship arising from a promise of marriage, and from a true but not consummated marriage, and called Public Propriety. In the present article we shall speak of consanguinity; in the succeeding, of the other kinds of relationship.

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[1] Schulte, Eher. pp. 145, 155.

[2] Soglia-Vecchiotti, vol. iii. p. 145.

240. Q. What is consanguinity or blood-relationship?

A. It is the bond or connection existing among persons who descend from the same proximate father or mother, by natural or carnal generation.[1] We say, "the same *proximate father*," etc.; for the fact that two or more persons descend *remotely* from a common parent does not produce blood-relationship between them. Otherwise every man and woman in the whole world would be blood-relatives, since all mankind have remotely the same common parents, namely, Adam and Eve. We say also, "father *or mother*;" that is, the consanguinity exists not only among those who have the same father AND mother, but also among those who have the same father but not the same mother, and *vice versa*.[2] This appears where, v.g., a father having children by his first wife, who is dead, marries a second wife, by whom also he has children. In the case, the children of the first and of the second marriage have the same father, but not the same mother. We say, lastly, by *carnal generation*. This is the efficient cause of the relationship. In other words, consanguinity consists in, and arises from, the fact that two or more persons have in their veins the same blood, by reason of their being generated by the same parents. Hence also consanguinity exists among children born of the same parents out of lawful wedlock.

241. From what has been said it follows that in blood-relationship three things are to be distinguished: 1° The father or mother common to different persons. This common parent is like the trunk of a tree (*stipes*). For as the

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[1] Mansella, l. c. p. 33.

[2] Ib.; Leur. l. 4, t. 14, Q. 220.

branches of a tree spring from and are united in its trunk, so, in blood-relationship, the person from whom descend the children, grandchildren, etc., is regarded as the trunk, in which all are united. 2° The body or series of persons (*linea*) who descend from the same parents, and the manner in which they so descend. Now persons descend from the same parents in two ways: (*a*) *in a direct line* (*linea recta*), namely, when one is generated by the other, and that either immediately, as sons or daughters, or mediately, as grandsons; (*b*) *in a transverse or collateral line* (*linea collateralis*), namely, where they have indeed a common parent, but yet do not descend one from the other. Thus two or more brothers and sisters have indeed the same father, but yet they do not descend from each other. 3° The degree (*gradus*) or measure of distance in the relationship of one person to the other. We use the Latin word *gradus*, which means *steps*. Because as the steps of a ladder measure the distance between its top and bottom, so do the steps or grades in consanguinity mark the distance or nearness of the relationship existing between different persons.[1]

242. Q. How may we know what degree or nearness of blood-relationship exists between different persons?

A. 1° *In the direct line*, whether we count upwards, v.g., from father to grandfather, or downwards, v.g., from father to son, there are as many degrees or steps of blood-relationship as there are generations, not, however, counting the common parent. Thus the son is related to the father in the first degree, the grandson in the second, the great-grandson in the third, etc.[2]

243. 2° *In the collateral line*, persons are related to each other in the same degree in which they are related to their common parent. Thus two brothers are related to *each other* in the first degree; their children, on either side, are

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[1] Feije, l. c. n. 351.

[2] Card. Kutschker, vol. iv. pp. 288, 289.

related to *each other* in the second degree; and so on. Because the brothers and their children are related to their common parents respectively in the first and second degrees. This rule holds where the degree or distance of relationship to the common parent is the same or equal on both sides (*linea collateralis aequalis*). But where it is unequal (*linea collateralis inaequalis*), that is, where the relationship to the common parent is more distant on the one side than on the other, the grade of collateral blood-relationship is counted from the more distant degree.

Q. 244. How far does the impediment of consanguinity annul the marriage, and by what law?

A. 1° Blood-relationship *in the direct line*, whether ascending or descending, annuls marriage *indefinitely*, that is, in all degrees, at least by the positive law of the Church.[1] We say, *at least*, etc.; for it is not certain whether it does so also by the law of nature. It is certain that this relationship annuls marriages, by the law of nature, in the *first degree*, i.e., between father and daughter. But it is disputed whether it annuls them, by the law of nature, also in the other degrees.[2] From this it follows that unbaptized persons are certainly bound by the impediment of blood-relationship, *in the first degree of the direct line.*

2° Consanguinity, in the *transverse or collateral line*, annuls marriage, by the positive law of the Church, to the fourth degree inclusive. We say, by *the positive law of the Church.* Does it also by the natural law? The question is disputed as to the *first* degree, i.e., between brothers and sisters.[3] The other degrees do not annul marriage by the natural law, but only by the positive law of the Church. Consequently unbaptized persons are certainly not bound, on the part of the natural and ecclesiastical law, by the second, third, and fourth degree of consanguinity in the collateral line.[1] We say, *ecclesiastical law;* can they be bound by these degrees on the part of the secular law? The solution of this question depends on this other question: Can secular governments establish diriment impediments in relation to the marriages of unbaptized persons? There are two opinions. Hence if a practical case occurred, it ought to be referred to the Holy See.[2]

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[1] Resp. Nicolai I. ad Bulg. c. 37.

[2] Feije, l. c. n. 366.

[3] Ib.; cf. Lehmkuhl, Comp. p. 512.

245. From the above it will be seen what is to be said of the marriages contracted by infidels, that is, by unbaptized persons, within the forbidden degrees of consanguinity. Accordingly, if a marriage is contracted between two persons, both of whom are unbaptized, and who are related to each other in the first degree of consanguinity of the direct line (*linea recta*)—namely, father and daughter, mother and son—the marriage is certainly invalid *ex jure naturae.* If a marriage is contracted between them within the second, third, or fourth degree of the direct line, the validity of the marriage is doubtful. Hence, apart from civil legislation to the contrary, the marriage is to be treated as valid, on the principle that *in dubio standum est pro valore actus*, at least until the Holy See, to whom the case should be referred, decides otherwise. The same holds of marriage contracted by them in the first degree of the transverse line, namely, between brother and sister. In the other degrees of the transverse line their marriage is valid, except where the secular law ordains differently.

246. We have said, *apart from the civil legislation to the contrary.* For it is generally admitted that the secular authority has power, at least *jure devolutivo*, to establish diriment impediments for unbaptized persons. Now, as a matter of fact, the secular power, also with us, annuls all marriages nearly within the same degrees of the direct and

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[1] Cap. 8, de divortiis (iv. 19).

[2] Feije, l. c. n. 367.

transverse line within which the Church annuls them. Thus the laws of New Jersey ordain:[1] "That no man or woman shall intermarry within the degrees hereinafter named, that is to say:

(*a*) "No *man* shall marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, mother, stepmother, wife's mother, daughter, wife's daughter, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter." (*b*) "No *woman* shall marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son."

247. Where, of the married couple, one is baptized and the other not, their marriage is governed by the impediments of the positive ecclesiastical law. For, as we have seen, all who are baptized, whether they be Catholics or sectarians, are subject to these laws, and therefore contract the diriment impediments which are *juris positivi*. Consequently a marriage between two persons, of whom one is baptized, the other not, and who are related to each other within *any* of the degrees of the direct line, or within the fourth degree of the transverse line is invalid unless a dispensation is obtained both from the impediment of *disparitas cultus* and also from that of consanguinity. But a dispensation *a disparitate cultus* contains in itself, *eo ipso*, a dispensation from the other impediments which are *juris ecclesiastici*, and from which the Church is accustomed to dispense.

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[1] Rev. Stat. p. 631, A.D. 1877.

248. This is inferred from the following decision of the S. C. S. O., March 3, 1825:[1] "Dubium 2^{um}. Paulus viduus Christianus Balbinam infidelem duxit in uxorem. Interim Demetrius Pauli filius, ex priori uxore proveniens, declarat se rem habuisse cum Balbina. Quaeritur an ex hujusmodi copula cum muliere infideli resultet impedimentum affinitatis in primo gradu?

"Resp. Duo sunt distinguenda. 1° Vel Paulus duxit in uxorem Balbinam infidelem praevia dispensatione Apostolica super cultus disparitate, vel absque Apostolica dispensatione. 2° Vel Demetrius rem habuit cum Balbina antequam Paulus eam sibi acciperet in uxorem, vel post. Si, praevia dispensatione Apostolica, Paulus Balbinam duxit, etiamsi praecessisset Demetrii copula cum eadem Balbina, jam pro valido habendum est matrimonium. Quippe impedimentum affinitatis praesertim ex copula illicita, ut in casu, cum non habeatur ut juris divini aut naturalis, sed tantum ecclesiastici, infideles ex mente ecclesiae non afficit, quia ecclesiae non subdita, *et ecclesia dispensando cum parte Catholica super disparitate cultus, ut cum infideli contrahat, dispensare intelligitur ab iis etiam impedimentis, a quibus exempta est pars infidelis, ut inde hujus exemptio propter contractus individuitatem communicata remaneat et alteri.*"[2]

249. We have said, *from which the Church is accustomed to dispense.* Now the Church never grants a dispensation in *any* of the degrees of the direct line, nor in the first degree of the transverse line. Hence a dispensation fron *disparitas cultus* never includes a dispensation in these degrees of consanguinity.[3]

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[1] Gasparri, l. c. n. 700, 701.

[2] Cf. S. C. de P. F. 23 Aug. 1852; Gasparri, l. c. n. 702.

[3] Gasparri, l. c. n. 701.

ART. IV.

SPIRITUAL RELATIONSHIP.

Συγγένεια

(*Cognatio spiritualis.*)

250. Persons acting as ministers or sponsors for those who receive baptism and confirmation are, so to say, *spiritual parents* of those who are baptized or confirmed.[1] And indeed, by baptism we are spiritually born, and by confirmation this spiritual birth is strengthened and confirmed. Hence, too, the sponsors are aptly called godfathers and godmothers, or spiritual fathers and spiritual mothers.[2] From this will be seen the propriety of annulling marriages between persons united by these close and sacred ties of spiritual relationship.

251. Q. What is the annulling impediment termed spiritual relationship, and how far does it annul marriages?

A. 1° The diriment impediment called *cognatio spiritualis* is the relationship arising from baptism and confirmation among certain persons specified in the law of the Church.[3] The impediment is not *juris divini* or *naturalis*, but solely *juris ecclesiastici*, and is therefore not contracted by unbaptized persons.

2° By the law of the Church, as in force at present, it annuls the marriage only (*a*) between the minister of baptism or confirmation and the sponsors, on the one hand, and the child or person baptized or confirmed and its father and mother, on the other.[4] Hence it does not annul the marriage as between the minister and the sponsors, nor as between sponsors themselves.[5]

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[1] Schulte, Eher. pp. 188, 189.

[2] Feije, l. c. n. 409.

[3] Heiss, de Matr. p. 145.

[4] Conc. Trid. sess. 24, cap. 2, de Ref. Matr.

[5] Mansella, p. 42; Lehmkuhl, Comp. p. 513.

252. Where this relationship supervenes a marriage already contracted, v.g., where a father or mother baptizes his or her own child, it does not annul the marriage, but simply, according to some, forbids, at times, the asking of the *debitum.*[1] We say, *at times;* for where it is done (*a*) in case of necessity, or (*b*) in ignorance of the relationship produced, or (*c*) from design to defraud the partner of the *debitum*, it does not forbid the asking of the *debitum.*[2] We say also, *according to some;* for a number of canonists hold that parents baptizing their children are in no case forbidden to ask the *debitum.*[3]

253. It is obligatory *sub gravi*, in the United States as elsewhere, to have at least one sponsor in baptism, except when it is conferred *privately* in case of necessity.[4] It is the custom, with us, always to have *two* sponsors in baptism, namely, a godfather and a godmother, who should be good Catholics. But in confirmation the custom prevails quite generally, among us, of having only two men as sponsors for all the boys or men confirmed, and two women for all the girls or women confirmed. This custom, no doubt, had its origin in the following decree: "Saltem duo pro pueris patrini, et duae pro puellis (confirmandis) matrinae adhibeantur."[5]

matronae

ART. V.

RELATIONSHIP BY ADOPTION.

(*Cognatio legalis.*)

254. The custom of adopting extraneous persons or strangers as children has existed at all times and among all nations. It still exists, also among us. The secular law, especially among the Romans, clearly defined how this

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[1] Cap. 2 de Cogn. spir. (iv. 11). [2] Feije, l. c. n. 426. [3] Mansella, l. c. p. 44.
[4] Conc. Pl. Balt. II. n. 231. [5] Ib. n. 253.

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adoption was to be made, and what were the rights and duties of both the adopter and the adopted. Only those adoptions obtained legal effect which were made in accordance with these prescriptions or laws.[1] Moreover, the Roman secular law decreed that marriages could not be validly contracted between the adopter and the person adopted, etc.[2] The Church, on her part, made this law her own, and decreed that adoptions made in accordance with the prescriptions of the Roman secular law should annul marriage among a certain class of persons.[3] We shall now discuss the nature of this impediment, and its application at the present day, especially in this country.

255. Q. What is the annulling impediment arising from adoption? Or what kind of adoption annuls marriage?

A. 1° The impediment in question, or the *cognatio legalis*, is the relationship arising from legal adoption. We say *adoption;* now adoption is the legitimate act by which a person who is not a son or a daughter by nature is nevertheless taken and treated as such.[4] We say also *legal;* by this we mean that (*a*) the adoption must be sanctioned by the secular law of the country, and (*b*) made in accordance with its prescriptions. Hence no adoption whatever, however complete and perfect, which is made solely by *private authority* and without the forms of secular law, constitutes the impediment of which we speak.[5] It will also be seen that no impediment arises from adoption, even though complete in every respect, which takes place in a country whose secular law does not recognize adoption. The

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[1] L. 1, 2, sq. ff. de adopt. (i. 7).

[2] L. 14 ff. de ritu nupt. (xxiii. 2).

[3] Cap. unic. de cogn. legali (iv. 12); Can. 1, C. 30, Q. 3, Nicolaus I. ad Consult. Bulgar.

[4] According to the Roman law, a person *sui juris* could be adopted either as a son or a daughter, or as a nephew or a niece. At the present day persons are adopted only as sons or daughters. Gasparri, l. c. n. 751, nota 1.

[5] S. C. S. O. 14 Januar. 1802.

Church recognizes as the diriment impediment only that adoption which is made according to the forms prescribed by the *secular laws* of a country, not that which takes place by private authority.[1]

256. 2° As we have seen, the law of the Church is that adoptions made in conformity with the prescriptions of the Roman law annul the marriage between certain persons. Now the secular Roman law, as laid down in the Justinian Code, recognizes and legalizes two kinds of adoption: one, perfect or complete, by which the person adopted passed entirely from the parental control and roof or home of his natural parents to that of the adopter, and of course also became the latter's heir at law. Only persons who were *sui juris* could be adopted in this perfect manner. Moreover, this adoption could be made only with the consent of the person adopted, who consequently had to be asked whether he consented to the adoption. From this asking (*rogare*, *adrogare*), this adoption itself came to be called *adrogatio*. Thus the Justinian Code says: "Dicitur *adrogatio*, quia et is, qui adoptat rogatur, id est, interrogatur *an velit eum quem adoptaturus sit, justum sibi filium esse;* et is, qui adoptatur rogatur, *an id fieri patiatur*."[2]

257. The other kind of adoption was less complete and consisted in this, that the person adopted became indeed, in law, the child of the adopter and also his heir at law, but yet remained under the control and in the family of his natural parents, and therefore did not pass to the parental authority of the adopter. Hence, by this adoption, the person adopted came to belong to the family of the adopter only *de jure*, but not *de facto*. The Justinian Code decrees that minor children (*filii familias*) or persons who are not *sui juris* cannot pass entirely out of the control of their

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[1] S. C. S. O. 16 Apr. 1671; Soglia-Vecchiotti, vol. iii. p. 152.

[2] L. 1. ff. de adopt. (i. 7).

natural parents, and therefore cannot be adopted in the full and perfect sense of the word, but only partially or in the imperfect manner just described.[1] This imperfect adoption was called *adoptio*, in contradistinction to the perfect adoption, which was termed *adrogatio*.

258. 3° That the impediment of *cognatio legalis* arose from the perfect adoption, as set forth, is admitted by all; but whether it was also produced by the above imperfect adoption is disputed.[2]

259. Q. Does the adoption as sanctioned by the secular laws of the present day, constitute the diriment impediment of *cognatio legalis?*

A. It is certain that at present the secular laws of the various countries of the world, and also with us, differ in many respects from the Roman law in regard to adoptions. But it seems safe to say, and it is the opinion of nearly all modern theologians and canonists, that wherever, at the present day, adoption is legalized by the secular law, and is *substantially* the same as the perfect adoption of the Roman secular law, there the impediment in question also exists.[3] Thus the celebrated Instr. Austr., so strongly recommended by the *Third Plenary Council* of Baltimore (n. 304), says in § 28: "Adoptio, qualis arrogationi seu adoptioni perfectae juris Romani *quoad essentialia* respondet, secundum nunc vigentem ecclesiae praxim, matrimonium dirimit."

260. Now what is the *substance* of the perfect Roman adoption? It is this, that a person takes and treats as his own child one who is the offspring of another; that therefore the person thus adopted acquires substantially the rights and duties of a natural child of the adopter, and consequently passes from the parental authority of its natural parents to that of the adopter. Wherever such an adop-

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[1] Inst. § 2 de adopt. (i. 11).

[2] Gasparri, l.c. n. 755.

[3] S. Poenitenteria, 17 Maii 1826; Soglia-Vecchiotti, vol. iii. p. 152; Feije, l. c. n. 435; Lehmkuhl, Comp. p. 514.

tion is recognized by law, it constitutes the diriment impediment.[1] Thus the above Instr. Austr. says, in article 29: "Adoptio juris Austriaci. . . . Matrimonium dirimit, quoties adoptatus paternae adoptantis potestati subjiciatur vel in ejusdem domum filiorum familias adinstar cohabitaturus recipiatur."

261. We have said, *is substantially the same as the perfect adoption of the Roman law.* There are authors who go farther than this. Thus De Angelis,[2] Santi,[3] and others contend that the imperfect Roman adoption annulled marriage as well as the perfect; hence they maintain that wherever, at the present day, the secular law recognizes adoption, and where the forms of such law are complied with in the adoption, there such adoption, no matter how it differs from that of the Roman law, and even though it corresponds only to the imperfect Roman adoption, constitutes the diriment impediment of *cognatio legalis.*[4] They argue that wherever the law recognizes adoption, no matter in what form, it, by that very fact, also regards the person adopted as the child of the adopting person, and that even though it does not require the person adopted to pass under the parental authority of the adopter, or to live as his child in his family, or to become his heir. Now it was just because of this legal relationship of child and parent that the present impediment was introduced. Again they say, in the whole world the Roman law on adoption has now been changed. And yet the Church retains the impediment arising from legal adoption, and the Holy See declared respectively in 1826 and 1853 that the adoption as sanctioned by the secular law of France and of the kingdom of Naples constituted the diriment impediment, provided the adoption was made in the manner prescribed by law.

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[1] Gasparri, l. c. n. 760.

[2] Lib. 4, t. 12.

[3] Lib. 4, t. 12, n. 10 sq.

[4] Soglia-Vecchiotti, vol. iii. p. 151.

262. Where it is doubtful whether the adoption recognized by the secular law is substantially the same as that of the Roman law, the only safe way is for the bishops of the country to lay before the Holy See the secular laws on this head, and to ask whether the adoption legalized by them constitutes the *cognatio legalis.*[1]

263. Q. Does the adoption as sanctioned by the secular laws of the United States produce the impediment of *cognatio legalis*, or legal relationship?

A. From what has been said, it follows that two things are at present necessary to constitute the impediment: 1° That the secular law should sanction adoption; 2° That in the adoption the forms of the secular law shall be observed. In regard to the first condition, we observe that legislation in this matter emanates from the various State legislatures—namely, State assemblies and senates—of the different States of the Union. Now in most of the States, if not in all, adoption is recognized and regulated by law.

264. Thus in the State of New Jersey a very perfect adoption is laid down in law. The words of the law are as follows: "The court (the circuit court, or the orphans' court of the county) shall make a decree reciting the facts at length and the name or names by which the child or children (adopted) shall thereafter be known, declaring and adjudging that, from the date of such decree, the rights, duties, privileges, and relations theretofore existing between the child or children and his or their parent or parents shall be in all respects at an end, excepting the right of inheritance; and further that the rights, duties, privileges, and relations between the child and his parent by adoption shall thenceforth in all respects be the same, including the right of inheritance, as if the child had been born to such adopting parent in lawful wedlock. . . . And upon the

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[1] Mansella, l. c. p. 47.

entry of such decree (in the office of the surrogate or county clerk) of adoption, the parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child, or from the child to them; and the child shall be free from all legal obligations of obedience or otherwise to the parents; and the adopting parents of the child shall be invested with every legal right in respect to obedience and maintenance, on the part of the child, as if such child had been born to them in lawful wedlock; and the child shall be invested with every legal right, privilege, obligation, and relation in respect to education, maintenance, and the rights of inheritance to real estate or to the distribution in personal estate on the death of such adopting parents, as if born to them in lawful wedlock."[1]

265. It will be seen that this adoption is perfect in every sense. We deem it, therefore, as certain that, not only in New Jersey, but in all other States where adoption is legally recognized, no matter in how imperfect a form, such adoption becomes the diriment impediment of *cognatio legalis*, and annuls marriage, provided that in the adoption the forms prescribed by the secular law be observed.[2] An adoption, no matter how perfect, made merely by *private authority* never produces the impediment.

266. Q. How far does adoption annul a marriage, by the law of the Church, also here?

A. By adoption the person adopted becomes, by fiction of law, the child of the adopter. Hence the legal relationship of parent and child exists between them. Consequently the relationship or impediment arising from adoption resembles that of consanguinity or natural blood-relationship, and therefore follows the same lines, both direct (*linea recta*) and transverse (*linea collateralis*), as the latter, though in a more restricted degree.

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[1] Revised Statutes of New Jersey, 1877, pp. 1346, 1347.

[2] Heiss, de Matr. p. 150, nota 1.

267. Accordingly, 1° Adoption annuls marriage, as *in linea recta*, between the parents or persons adopting, on the one side, and the person adopted and the latter's children, if he have any, on the other, to the fourth degree, provided these children, grandchildren, etc., were at the time of the adoption under the parental authority of the person adopted. At the present day only children who are minors, i.e., under the age of twenty-one, are, as a rule, adopted. Hence there can scarcely ever be question of the children, etc., of the person adopted. This impediment endures forever, even though the adoption be severed.

268. 2° Again, adoption annuls marriage, as *in linea collaterali*, between the person adopted, on the one hand, and the sons and daughters (but not others, v.g., grandchildren, etc.) of the parent or person adopting, on the other. Because the person adopted and the natural children of the adopter become by law brothers and sisters.[1] This impediment, however, endures only as long as the person adopted and the natural children of the adopter remain under the parental authority of the latter, and therefore ceases when this parental authority over them is dissolved, either by the death of the adopter or by the emancipation of the person adopted or of the natural children.[2]

269. 3° Finally, adoption also annuls marriage, as *in affinitate*, between the adopter (if a male) and the wife of the person adopted, and likewise between the person adopted (if a male) and the wife of the adopter.[3] Because by law these parties become respectively father-in-law and daughter-in-law, and mother-in-law and son-in-law. As will be seen, this affinity can scarcely ever occur at the present day.

270. The impediment arising from adoption is *juris ecclesiastici* only, and therefore not *juris naturalis* or *divini*.[4]

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[1] Cap. unic. de Cogn. leg. (iv. 12).

[2] Santi, l. 4, t. 12, n. 13.

[3] Mansella, l. c. p. 48.

[4] Feije, l. c. n. 436.

Hence it does not bind unbaptized persons, except, perhaps, as we have seen, where the secular law makes adoption a diriment impediment.

ART. VI.

RELATIONSHIP BY MARRIAGE.

(*Affinitas.*)

271. We find that among all civilized nations a natural repugnance has always existed and still exists against marriages among persons closely related to each other by marriage. The relationship which springs from marriage, or even from the *copula carnalis* out of marriage, is called *affinity*, in contradistinction to the relationship by blood, which is termed *consanguinity*.[1] We shall inquire what is the annulling impediment of affinity; how far and by what law it annuls marriage.

272. Q. What is the diriment impediment arising from affinity?

A. The affinity which annuls marriage is the relationship or connection among certain persons which springs from the *copula carnalis*, licit or illicit.[2] For by the *copula* a man and a woman become, so to say, one flesh and one blood. Hence the two lines of blood-relatives, namely, that of the man and that of the woman, become, so to say, merged into one,[3] and the blood-relatives of the man become also the blood-relatives of the woman, and *vice versa*.[4]

273. We say, from the *copula carnalis*; this *copula*, however, must be perfect and complete, in such a manner as to be capable of producing offspring. Otherwise the man and the woman would not become one flesh and blood. But once the *copula* itself is admitted or proved, it is always presumed,

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[1] Schulte, Eher. p. 174.

[2] Mansella, p. 49.

[3] Heiss, de Matr. p. 150.

[4] S. Thomas, suppl. Q. 55 ad 1.

in foro externo, to have been perfect and complete, and *apta generationi*.[1] We say, moreover, *licit or illicit*.[2] By licit *copula* we mean that which takes place in marriage; by illicit, that which occurs out of marriage, and is therefore sinful. Consequently the impediment of affinity exists wherever there has been a *copula apta generationi*, whether in or out of marriage. From this it follows that no affinity arises from a marriage which has not been consummated by a *copula apta generationi*, although, as we shall see, such a marriage would give rise to the impediment *publicae honestatis*.

274. Q. In what sense and how far does affinity annul marriage?

A. 1° We have seen that the *copula carnalis perfecta* makes the man and the woman having such intercourse, in a measure and by fiction of law, one and the same flesh and person; that in consequence the blood-relatives of the man in the case become also the blood-relatives of the woman, and *vice versa*. This affinity or artificial blood-relationship follows the same lines and degrees as the natural blood-relationship. In other words, the degree and line of affinity is computed according to the degree and line of consanguinity. Moreover, the affinity which annuls the marriage exists only (*a*) between the *blood-relatives* of the man having the *copula* and the *woman* with whom he has had it, on the one hand; (*b*) between the *blood-relatives* of the woman and the *man* on the other. Hence the general rule is: Only the husband becomes related by affinity to the blood relatives of his wife, and that in the same degree and line in which they are related to her by consanguinity;[3] likewise the wife only becomes related by affinity to the blood-relatives of her husband, and that in the same line and degree in which these relatives are related to her husband by consanguinity.[1] We say, the *husband only* . . . *the wife only;* consequently the blood-relatives of the husband do not contract affinity with the blood-relatives of the wife, nor *vice versa.*[2]

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[1] Feije, l. c. n. 370.

[2] Cap. 8, de eo qui cogn. (iv. 13).

[3] Feije, l. c. n. 372.

275. 2° How far does this affinity contracted between the man having the *copula* and the relatives of the woman with whom he has had it, and *vice versa*, annul marriage? It annuls marriage (*a*) in *all* the degrees of the *linea recta;* (*b*) as far as the fourth degree inclusive, in the *linea collaterali*, where the affinity arises from a lawful, that is, matrimonial, *copula;* (*c*) as far as the second degree, in the collateral line, where the affinity springs from an illicit or extra-matrimonial *copula.*[3]

276. Q. Does affinity annul marriage by the positive law of the Church, or by the natural and divine positive law?

A. 1° It is certain that affinity annuls marriage in the *linea transversa*, only by the positive law of the Church. This is also certain with regard to affinity *in linea recta* arising from an illicit *copula*, and that even in the *first degree* of the *linea recta.* With regard to affinity *in linea recta* which arises from the matrimonial or lawful *copula*, authors agree that the impediment is *juris ecclesiastici*, except when there is a question of the *first* degree. With regard to this degree there is a dispute. But the more common opinion is that also in this degree the marriage is not annulled except by the positive law of the Church. Yet Popes have never granted a dispensation in the first degree, arising from a *copula licita.*

Hence unbaptized persons are not bound by the impediment of affinity, except perhaps in the *first* degree of *the linea recta*, arising from a lawful *copula.*

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[1] Heiss, l. c. p. 153.

[2] Cap. 5, de Consang. et aff. (iv. 14).

[3] Conc. Trid. sess. 24, cap. 4, de Ref. Matr.

ART. VII.

PUBLIC PROPRIETY.

(*Publica honestas.*)

277. This impediment, though different from, yet greatly resembles, both in its cause and effects, the impediment of affinity discussed in the foregoing article. For as affinity arises from the carnal union, or the union of *bodies*, so public propriety or decency springs from the union of *minds* which takes place in marriage promises, and in marriages, where a union of bodies—i.e., the *copula carnalis apta generationi*—has not occurred. In fact, it is plain that both a promise of marriage and a marriage which is valid indeed but not consummated produce a most intimate union of mind between the parties. Hence the Church considers them as *one*, and therefore enacts, for reasons of public propriety, that each contracts, as in affinity, relationship with the blood-relatives of the other.

278. Q. What, therefore, is the impediment called public propriety?

A. Public propriety as an annulling impediment is a relationship contracted among certain persons in two cases; (*a*) by reasons of a valid promise of marriage; (*b*) by a *matrimonium ratum et non consummatum*—i.e., by a marriage which has been contracted indeed, but has not been consummated.

279. We say, "*valid* promise of marriage;" for an invalid promise does not produce the impediment. Now a promise of marriage (*sponsalia*), or an engagement, is valid only when it is given (*a*) by both parties, (*b*) freely and without constraint, (*c*) with full deliberation, (*d*) both internally and externally. A promise having these requisites constitutes the impediment. It is therefore not necessary, apart from a custom in a place having the force of law, that the promise

should be given in a public or solemn manner, v.g., in the church, or in writing, or in the presence of witnesses, or in any set form of words.[1] However, a promise of marriage, being a restriction on the liberty of marriage, is not presumed, and therefore, if denied, must be fully and canonically proved by the person who affirms its existence or validity.

280. We say also, *by a marriage contracted*, *indeed*, etc; but we do not say, *validly contracted.* For the impediment arises also from a marriage which in appearance has been validly contracted, but is in reality invalid, provided the invalidity does not proceed from a defective consent.[2]

281. Q. How far and by what law does public propriety annul marriage?

A. 1° Public propriety acts like affinity and annuls marriage in a similar manner. When the public propriety arises from a promise of marriage, it annuls marriage between the male engaged and the blood-relatives of the female to whom he is engaged to the *first degree* only, both in the *direct* and the *transverse* line.[3] When it proceeds from a marriage not consummated, it annuls the marriage, as in affinity, between the husband and the blood-relatives of his wife, and *vice versa* between the wife and the blood-relatives of the husband, to the fourth degree inclusive *in linea collaterali*, and indefinitely *in linea recta.*[4]

2° The impediment, once contracted, endures always. Hence, v.g., even where a valid promise of marriage is afterwards dissolved by mutual consent or otherwise, the impediment created by it remains binding on the persons affected by it.[5]

3° This impediment is purely *juris ecclesiastici*, and therefore admits always and in all degrees of dispensation, and does not bind unbaptized persons.

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[1] Feije, l. c. n. 391.

[2] Ib. n. 395.

[3] Conc. Trid. sess. 24, cap. 3, de Ref. Matr.; Cap. 3, 4, 8, de Spons. et Matr. (iv. 1).

[4] Permaneder, § 402, p. 682.

[5] Mansella, p. 74.

ART. VIII.

DIFFERENCE OF RELIGION.

(*Cultus Disparitas.*)

§ 1. *Antecedent "Disparitas Cultus."*

282. Marriage is the closest of all unions, and that for a whole lifetime, and has for one of its chief objects the Christian education of the children. The married couple should have common interests, not only in temporal, but also in spiritual and religious matters. They should bring up their children in the fear of God and in the true Church. But what can be more opposed to this union of heart and mind, to this community of interests, and to the religious bringing-up of the children than the difference upon the most important of all things, namely, of the true religion?[1] Hence, marriages between Catholics and Protestants are forbidden; those between Catholics or baptized persons and unbaptized persons are invalid.

283. Q. What, then, is the annulling impediment arising from difference of religion?

A. 1° The law of the Church, as introduced by universal custom and practice, rather than by any written law,[2] is that a marriage between a baptized person, whether Catholic or Protestant, and an unbaptized person, v.g., a pagan, Mohammedan, Turk, is invalid. We say *unbaptized;* for the marriage between a Catholic and a baptized Protestant is forbidden indeed and illicit, but not invalid.

284. 2° This impediment is solely *juris ecclesiastici;*[3] is therefore always dispensable by the Church, and does not

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[1] Schulte, Eher. p. 221 sq.

[2] Bened. XIV. Const. *Singulari Nobis*, 9 Feb. 1749.

[3] Mansella, l. c. p. 77.

bind unbaptized persons, as among themselves. Hence the marriage between a Jew and a Turk, or in general between unbaptized persons, both parties being unbaptized, is valid. Yet, as we have seen, when, of two married persons who are infidels one is converted to the true faith and baptized, and the other remains an infidel and refuses, upon due interpellation, to be converted, or to live with the converted spouse *sine contumelia creatoris*, then the marriage contracted by them while infidels is not indeed dissolved at once, but nevertheless becomes soluble in the sense that the converted party may marry a Catholic, and thereupon, by such second marriage, the former is *ipso facto* dissolved, as we shall see below.

285. We have said above, "*between a baptized and an unbaptized person.*" This applies, of course, *where it is certain* that one party is validly baptized and that the other is either not baptized at all or not validly baptized. Thus far there is no difficulty. The difficulty, however, arises when it is *not certain*, that is, when it is *doubtful*, whether one or both parties are either baptized at all or baptized validly. What rule is to be observed in this case? The answer is: The baptism is to be presumed as having been conferred and as being valid, in order to the validity of the marriage, whether about to be contracted or already contracted, in all cases *where it is or remains doubtful* whether it has been administered at all or whether it has been administered validly.[1]

286. This answer is clearly contained in the decision of the S. C. S. Officii of Nov. 17, 1830, and reaffirmed on Sept. 18, 1890.[2] The decree of 1830 is as follows: "Quaesitum erat an Calvinistae et Lutherani in illis partibus degentes quorum baptisma *dubium et suspectum est*, infideles habendi sint, ita ut inter eos et Catholicos disparitatis cultus im-

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[1] Gasparri, l. c. n. 597.

[2] Acta S. Sedis, A.D. 1892, pp. 574, 575.

pedimentum dirimens adesse censeatur? Cui instantiae responsum fuit: 1° Quoad haereticos quorum sectae ritualia praescribunt collationem baptismi absque necessario usu materiae et formae essentialis, debet examinari casus particularis. 2° Quoad alios qui juxta eorum ritualia baptizant valide, validum censendum esse baptisma. Quod *si dubium persistat*, etiam in primo casu, censendum est validum baptisma, in ordine ad validitatem matrimonii. 3° Si autem *certe cognoscatur* nullum baptisma ex consuetudine actuali illius sectae, nullum est matrimonium. Hisce omnibus SSmus superaddi mandavit: In tertio casu praefati decreti respiciente *nullitatem certam* baptismi in parte haeretica, recurratur in casibus particularibus."[1]

287. Hence a marriage already contracted is presumed to be valid (*a*) when it is certain that one of the married couple is validly baptized, and *doubtful* whether the other is either baptized at all or baptized validly; (*b*) when it is doubtful and remains doubtful, after due investigation, whether *either* of the spouses was baptized at all or baptized validly. For, as we have seen, in all cases of doubt, whether of baptism administered at all or administered validly (*dubium facti et juris*), the presumption is that it was administered, and administered validly, in order to the validity of the marriage.

288. We have said, "*a marriage is* '*presumed*' *to be valid.*" Note the word *presumed.* The presumption in the case is a simple presumption or inference drawn by the law—a *praesumptio juris tantum*, not a *praesumptio et de jure.* Now a simple presumption always gives way to the truth, that is, to the real facts of a case. Consequently, if it is afterwards discovered *as certain* that the party of whose baptism there was a doubt is in reality either not baptized at all or not baptized validly, the marriage, in the case, ceases to be regarded or presumed as valid.

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[1] Apud Rituale Rom. p. 544, Baltimori 1874.

289. This conclusion is not admitted by Gasparri. He contends that where a marriage has been contracted, in the case of a doubtful baptism, and it is afterwards found out *for certain* that there was, on the part of one of the married couple, either no baptism at all or no valid baptism, the marriage remains valid, on the ground that the Church dispenses tacitly from the impediment of *disparitas cultus* in such cases, or that she does not wish her law—that is, the impediment—to bind under such circumstances.[1] Lehmkuhl[2] thinks this view may be applied where the marriage, in the case of a doubtful baptism, has been contracted with a dispensation *a mixta religione*, because it would appear that the Church, in granting a dispensation *mixtae religionis*, grants also in such cases a tacit dispensation from the impediment of *disparitas cultus*. But Lehmkuhl also holds, as we do, that where the marriage in the case has been contracted without a dispensation *mixtae religionis*, the marriage is valid or invalid according as the baptism is afterwards found to be valid or invalid.

290. Whenever, therefore, a person petitions that a marriage already contracted shall be annulled by reason of the impediment of *disparitas cultus*, he must prove it as certain that one of the spouses was validly baptized at the time of the marriage, and that the other was either not baptized at all or not validly. We say, *as certain;* for if a doubt remains, the marriage must be declared valid.

§ 2. *Difference of Religion supervening Marriage. The "Privilegium Pauli."*

291. Having spoken of the difference of religion which exists between two persons prior to their marriage, we shall now dwell briefly upon the difference of religion which arises between a man and a woman *after* their marriage.

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[1] Gasparri, l. c. n. 597, 598.

[2] Compend. n. 1061.

We speak of the case where, as we have just seen, a man and a woman—both of whom are unbaptized—get married while unbaptized, but where afterwards one of them becomes baptized and converted to the faith, while the other remains unbaptized. With regard to this difference of religion supervening between the two spouses after they are already married, we shall inquire whether, when, how, and under what circumstances it annuls the marriage contracted by the spouses while both were unbaptized.

292. Q. Under what circumstances are the marriages contracted between two infidels or unbaptized persons to be dissolved?

A. When, of two persons who were unbaptized and who became validly married while both of them were unbaptized, one becomes converted to the faith and is baptized, while the other remains an infidel or unbaptized, the marriage contracted by them while unbaptized is not dissolved *ipso facto*, that is, by the conversion and baptism of one of the two. Yet the party converted may, if the unconverted spouse refuses to continue to live in marriage with the converted spouse, or, at least, refuses to do so peacefully and without contumely to the Creator, or without drawing the convert into mortal sin, contract a new marriage with another person who is a baptized Christian, by which latter marriage the first one contracted in infidelity is dissolved.[1]

293. We say, *the marriage is not dissolved by the fact itself of the conversion and baptism of the spouse.* This is admitted by all, and is clearly defined by Pope Innocent III., in his celebrated Decretal, *Gaudemus in Domino*,[2] when he says: "Cum per sacramentum baptismi non solvantur conjugia (in infidelitate contracta), sed crimina dimittantur." This is also clearly intimated by St. Paul, when he says: "Si quis frater uxorem habet infidelem, et haec consentit habitare cum

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[1] Feije, de Imp. n. 471.

[2] Cap. 8 de Divort. (iv. 19); Perrone, de Matr. Christ. vol. ii. p. 295.

illo, *non dimittat illam.*"[1] In fact, as we have seen, a marriage contracted between unbaptized persons or infidels is a true, valid, and legitimate or lawful marriage if it is contracted without any impediment of the natural or divine positive law.[2] Hence such a marriage, if contracted without any such impediment, is indissoluble *jure divino*, or by the law of God Himself.

294. We have added, *yet the party converted may, if the unconverted spouse refuses to live*, etc. Here we lay down the conditions under which the infidel marriage may be dissolved. In other words, the convert may, if he chooses, pass to another marriage, provided the unconverted spouse refuses to continue to live with him peacefully, etc. These are, then, the conditions under which alone the marriage contracted in infidelity can be dissolved. That the marriage can be dissolved under these conditions admits of no doubt whatever.

295. Q. By what right or law can the marriage contracted by infidels be dissolved under the above conditions?

A. 1° The marriage validly contracted by unbaptized persons is, as we have seen, *jure divino* indissoluble. Consequently it can be dissolved, even in the case and under the conditions mentioned, only by God Himself, but not by any human or ecclesiastical power. Besides, as we have shown, a diriment impediment which supervenes a marriage already contracted does not affect its validity. The question, therefore, is: Has God authorized or sanctioned the dissolution of the marriage in the case? Yes. It is certain that God has granted a dispensation from the indissolubility of marriage under the conditions and in the circumstances mentioned. Hence the marriage under discussion is dissolved, not by human or ecclesiastical authority, but by divine concession or dispensation.

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[1] I. Cor. vii. 12, 13.

[2] Can. Si quis, 2, C. 28, Q. 1.

296. 2° This divine concession or dispensation is thus promulgated by St. Paul:[1] "Si quis frater uxorem habet infidelem, et haec sonsentit habitare cum illo, non dimittat illam, et si qua mulier fidelis habet virum infidelem, et hic consentit habitare cum illa, non dimittat virum. . . . Quod si infidelis discedit, discedat; non enim servituti subjectus est frater aut soror in hujusmodi; in pace autem vocavit nos Deus." Hence Pope Benedict XIV.[2] writes: "Certum est, infidelium conjugium, ex privilegio in Fidei favorem *a Christo Domino concesso*, et per Apostolum Paulum (I. Cor. vii.) promulgato, dissolvi cum conjugum alter Christianam Fidem amplectitur, renuente altero, in sua infidelitate obdurato, cohabitare cum converso, aut cohabitare quidem volente, sed non sine contumelia Creatoris, hoc est, non sine periculo subversionis conjugis fidelis, vel non sine execratione Sanctissimi nominis Christi, et Christianae Religionis despicientia." Likewise Perrone[3] says of the dissolution of the marriages under discussion: "Ast id non fit ex auctoritate ecclesiae, quae non potest dissolvere quod Deus conjunxit, neque ad id potestatem a Deo est assecuta, *sed immediata a Dei privilegio in fidei favorem*, ut exponit cum communi theologorum Benedictus XIV."

297. Q. What is meant by the condition *sine contumelia Creatoris?*

A. The marriage of infidels, as we have seen, cannot be validly dissolved, in the case under discussion, save when the unbaptized spouse refuses either (*a*) altogether to live with the convert, or (*b*) agrees indeed to continue the cohabitation, but yet not *sine contumelia Creatoris*. For the privilege conferred by Our Lord Himself upon the convert in the case is not absolute, but *conditioned*. It is therefore important to know fully and clearly what these conditions are, and when they are really fulfilled in a given case. Hence the convert cannot contract a new marriage unless these conditions are fulfilled.[1]

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[1] I. Cor. vii. 12–15.

[2] De Syn. l. 6, cap. 4, n. 3; l. 13, cap. 21, n. 1.

[3] De Matr. vol. ii. p. 296.

298. St. Paul states these conditions in these simple words: "Quod si infidelis discedit, discedat." This *discedit* on the part of the infidel spouse has been defined by the Church to mean and take place (*a*) when the unconverted spouse refuses altogether to continue to live in marriage with the convert, v.g., when, upon being asked, he declares simply that he will not live any more with the convert, whether out of hatred for the Christian religion or not; (*b*) when the infidel spouse is indeed willing to continue to live with the convert, but yet not without molesting the latter in the full and free exercise of the faith, or (*c*) not without drawing him or her into mortal sin. Thus Pope Innocent III. defines: "Si enim alter infidelium conjugum ad fidem Catholicam convertatur, altero vel (1) nullo modo, (2) vel non sine blasphemia divini nominis, (3) vel ut eum pertrahat ad mortale peccatum, ei cohabitare volente; qui relinquitur, ad secunda, si voluerit vota transibit: et in hoc casu intelligimus, quod ait apostolus: *si infidelis discedit, discedat; frater enim vel soror non est servituti subjectus in hujusmodi.*"[2]

299. Consequently there are three cases where the marriage contracted in infidelity can be dissolved and where the convert may contract a new marriage: 1° Where the unbaptized spouse simply refuses to continue to live with the convert;[3] 2° Where the unbaptized spouse is indeed willing to continue to live with the convert, though not *sine contumelia Creatoris*[4] or *blasphemia divini nominis;* that

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[1] Cap. 8 de Divort. (iv. 19).

[2] Cap. 7 de Divort. (iv. 19); cap. 8, eod.

[3] Can. 3, C. 28, Q. 1.

[4] Benedict XIV., De Syn. l. 6, cap. 4, n. 3, explains this phrase thus: "Sed non sine contumelia Creatoris, hoc est non sine periculo subversionis conjugis fidelis, vel non sine execratione Sanctissimi nominis Christi, et Christianae religionis despicientia."

is, where the infidel is not willing to allow the convert the full and free exercise of the Christian faith, or where he is unwilling to abstain from molesting the convert on account of the faith, or where he shows contempt and hatred for God, Christ, or the Christian religion, or forbids the praises of God or of Christ, or seeks to induce those belonging to the household to forsake the faith; 3° Where he is willing to live indeed with the convert, but yet seeks to drag him or her into mortal sin, of whatever kind.[1] Any of these three cases or conditions, taken disjunctively, is sufficient for the dissolution of the marriage.[2]

300. However, the fact that these conditions, or any of them, exist in a given case must be morally certain, and must, moreover, be *positively proved*, and cannot be presumed or inferred.[3] In other words, the fact that the unbaptized spouse refuses to continue to live with the convert, etc., is to be positively verified. For this purpose, it is absolutely necessary,[4] and that, as it would seem, by *divine precept* (*praecepto divino*),[5] not merely by ecclesiastical law, to ask (*interpellare*) the unbaptized spouse whether he is willing to live with the convert, and that without molesting him or her in the exercise of the true faith, or without inducing or urging him or her to commit mortal sin.[6] Otherwise, that is, without such interpellation, the convert cannot validly enter upon a new marriage,[7] and if he or she nevertheless does so, the second marriage is to be regarded as invalid, since the first one is to be regarded as not dissolved.[8]

301. But sometimes it may happen that it will be morally or even physically impossible to make the interpellation, v.g., where the infidel spouse is in a distant country, or very

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[1] Feije, de Imp. n. 487.

[2] Perrone, de Matr. vol. ii. p. 296, nota 30.

[3] S. C. C. 23 Januar. 1603.

[4] Card. Kutschker, l. c. vol. i. pp. 389, 390.

[5] S. C. C. una *Florentina*, 17 Jan. 1722; Bened. XIV. De Syn. l. 6, cap. 4, n. 3.

[6] Perrone, de Matr. l. c. p. 297.

[7] S. C. de Prop. Fide, 5 Mart. 1816.

[8] Feije, l. c. n. 482, 487.

difficult of access, or hides, or where it is unknown where he or she lives, etc. What is to be done in such a case? Can the converted spouse enter upon a new marriage without making the interpellation? No; but a dispensation from the obligation of making the interpellation must be obtained from the Supreme Pontiff,[1] to whom alone belongs the right to declare under what circumstances the divine precept by which the obligation of making the interpellation is imposed ceases to bind.[2]

302. This dispensation is sometimes granted by the Holy See in a general way to all the bishops of a country, so that they may dispense, as Papal Delegates, with the interpellation, in cases occurring in their respective dioceses. Bishops in the United States have no such Papal Delegation, at least generally speaking, and consequently recourse is to be had to Rome in each case, with us, as is also plainly intimated by the S. C. de Prop. Fide, Instr. *Causae Matr.* § 45.

303. Of course, the Holy See can grant the dispensation from the interpellation, that is, give permission to omit it, only where it is morally or physically impossible to make it, as already stated. For the obligation of making the interpellation is imposed by divine precept, and therefore cannot be remitted by the Pontiff, save when its observance is impossible. The Supreme Pontiff, and he alone, can, as the interpreter of the divine precept, declare that it does not bind in the case of physical or moral impossibility of observing it.

304. Hence the Pontiff, in granting the dispensation, or in delegating bishops to grant it in his name, always enjoins that it shall be proved beforehand, and that at least by a summary and extrajudicial inquiry into the facts which is to be put in writing and carefully preserved, that it is morally or physically impossible to make the

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[1] S. C. C. 17 Januar. 1722; S. C. de Prop. Fide, 5 Mart. 1816.

[2] Bened. XIV. De Syn. l. 6, cap. 4, n. 3; Feije, l. c. n. 482.

interpellation.[1] When application is made to Rome, in a particular case, for a dispensation, this written inquiry or process is to be sent to Rome along with the petition for the dispensation from the interpellation, so that the Holy See may know whether it is impossible to make the interpellation. Consequently, in all cases where the interpellation is omitted by virtue of papal dispensation, it must be proved beforehand, at least summarily and extrajudicially,[2] that the infidel spouse cannot be interpellated owing, v.g., to his being too far away, or because it is not known where he is, etc. This investigation must be committed to writing, so that a proof may exist, for all future times, of the impossibility of making the interpellation.[3]

305. Outside of the case of a papal dispensation, the interpellation is always required *jure divino*, and that on pain of invalidity of a new marriage.[4] Moreover, the law of the Church prescribes that it shall be made *juridically*, and consequently with the intervention of the Episcopal Curia,[5] so that there may be full juridical proof of its having been made.[6] For, unless the fact that the interpellation has been duly made is fully proved, the convert cannot, *in foro externo*, be allowed to contract a new marriage, and the marriage contracted in infidelity cannot be considered as dissolved.[7]

306. For this purpose, also, the fact that the interpellation has been made, or a dispensation from it obtained, should be carefully noted in the marriage registers. Thus the S. C. de P. F. Instr. *Causae Matr.* § 45 says: "Ad probandum vero, utrum interpellatio vel ejus dispensatio intercesserit, consulendi erunt libri matrimoniorum, vel etiam regesta curiae, in quibus haec accurate erunt semper recensenda."

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[1] Gregor. XIII. apud Perrone, de Matr. vol. ii. pp. 300, 301, 302.

[2] S. C. C. 8 Junii 1611; Bened. XIV. De Syn. l. 13, cap. 21, n. 6.

[3] Feije, l. c. n. 488.

[4] Ib. n. 494.

[5] Ib. n. 487.

[6] Bened. XIV. de Syn. l. 13, cap. 21, n. 4.

[7] Feije, l. c. n. 487, in fine.

307. The next question is: Can the converted spouse, in the case, after the interpellation or dispensation from it, marry another *unbaptized* person, or can he or she validly marry only a baptized person? It is certain that the convert can validly marry only a baptized person,[1] and cannot, even with a papal dispensation from the impediment *disparitas cultus*, marry an unbaptized person. Nay, it appears more than probable that the convert can validly marry only a *Catholic* person.[2] This seems apparent from the *aim* of the divine privilege promulgated by St. Paul, and also from decisions of the Holy See. For St. Paul, expounding the divine will, gives the convert the privilege of dissolving the marriage with the infidel, and of marrying another person, *only in order* to avoid the danger of losing the faith, or of living in religious strife or in sin. Consequently it cannot be said that the apostle gives the convert the right to marry a heretic or Protestant. For, in marrying a Protestant, the convert, in the case, would not avoid the above dangers, but, on the contrary, often greatly increase them.

308. Likewise Pope Gregory XIII., Const. *Populis ac Nationibus*, 25 Januar. 1585, expressly says that the convert in the case can only marry again *cum quovis fideli*.[3] And the S. C. de Prop. Fide has decided that the convert can remarry only *cum fideli baptizato*, but not even with an unbaptized catechumen, or one who is under religious instructions in order to be admitted into the Church.[4]

309. Now by *fidelis*, or *fidelis baptizatus*, the Church always means those who have the *true faith* and who belong

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[1] S. C. de P. F. 16 Januar. 1683; Perrone, l. c. p. 302, nota 38.

[2] This seems clearly intimated by the S. C. de P. F. Instr. *Causae Matr.* 1884, § 45, in these words: "Si matrimonium acciderit cum parte CATHOLICA post baptismi susceptionem," etc.

[3] Apud Perrone, l. c. p. 300.

[4] S. C. de P. F. 16 Januar. 1683; Perrone, l. c. p. 302, nota 38.

to the *true Church*, but not those who have embraced a false religion and belong to a sect separated from her. On the contrary, the latter, even though baptized, are regarded by her as *rebels*, *heretics*, and *unfaithful* children.

310. *Does the privilege promulgated by St. Paul apply also to heretics?* The following case has occurred, and still occurs not unfrequently. Of two unbaptized people married to each other, one becomes a Protestant, that is, is baptized by some Protestant minister and becomes a member of some Protestant sect, and thereupon wishes to marry a Catholic, during the lifetime of the infidel spouse. Can he do so, under the Pauline privilege? In other words, suppose that, of two unbaptized spouses,—whether they are Jews, Mohammedans, Pagans, etc.,—one becomes a Protestant, v.g., a Methodist, Episcopalian, Lutheran, and the other refuses to continue to live peacefully with him and *sine contumelia Creatoris:* can the spouse thus become a Protestant pass to another marriage, under the divine privilege explained and promulgated by St. Paul, I. Cor. vii. 12 sq.?

311. There are some who answer in the affirmative, on the ground that the words *frater*, *soror*, *vir fidelis*, *mulier fidelis*, used by St. Paul in I. Cor. vii. 12–16, and the word *fideles*, as used by the Church, mean all *baptized* persons, and consequently also heretics, provided they are validly baptized.[1]

312. Others answer in the negative, and contend that the negative seems to be the only view that can be safely held, at least practically speaking. In fact, they say, the view that the Pauline privilege does not apply to Protestants, or heretics, appears to be the only one that harmonizes with the text of St. Paul, with the aim and object of the privilege in question, and with the teaching and practice of

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[1] Perrone, de Matr. vol. ii. p. 324; Gury-Ballerini, vol. ii. n. 759, sub 3, in fine.

the Church. For it is plain that by *frater et soror*, *frater fidelis*, *soror fidelis*, St. Paul meant only *Catholics*, or members of the *true Church*, and that he did not dream of applying those terms to heretics or members of false sects. He wrote to the Corinthians, who had been converted from paganism to the true Church. To them alone, therefore, and to others who, like them, are converted to the *true faith*, does he apply the privilege in question.

313. Again, they continue, the privilege promulgated by St. Paul was granted only *in favorem fidei*, that is, in order to free the convert from the danger of losing the faith or of suffering, at the hands of the infidel spouse, annoyances and hindrances in the exercise of religious duties. Now surely it cannot be said that an infidel spouse who becomes a Protestant is exposed to the danger of losing the faith, etc., by continuing to live with the spouse who remains unbaptized. Surely it cannot be said that what is granted *in favor of the faith* can also be claimed by *heresy*, or a *denial of the true faith*, and by rebellion against the Church. Shall it be said that St. Paul wished to favor *heresy?* Moreover, it would seem unreasonable that heretics, who deprived themselves, of their own free will, of membership with the true Church, should be entitled to privileges granted to members of the true Church.

314. Lastly, they say, the letter and spirit of the law of the Church regard heresy as *infidelitas positiva*, and heretics not as *fideles*, but as *haereticos*, *rebels* and *unfaithful* children. Consequently by the words *fidelis frater aut soror*, as employed by St. Paul, or by the word *fidelis* or *conversus ad fidem*, as used in the decisions of the Holy See, on this matter, the Church means only members of the *true Church*, or converts to the *true faith*, that is, to the *Catholic Church*. The contrary supposition would be tantamount to supposing that the words *conversus ad fidem* or *fideles*, as used by the Church, mean the same as *conversus ad haeresim* and *haeretici*,

which certainly cannot be admitted. Hence the law of the Church which applies the Pauline privilege[1] to those *qui ad fidem convertuntur*, or to *fideles*, can only mean converts to the Catholic Church.

315. Therefore they conclude that the opposite opinion does not appear to have any solid foundation. Its main argument is that the word *fideles*, as used in the law of the Church in connection with the Pauline privilege,[2] means all baptized persons, and therefore also heretics if they are baptized. This inference or reasoning, however, seems incorrect to those who hold the opposite opinion.[3]

316. In fact, say the latter, the law of the Church, in a number of places, expressly applies the Pauline privilege only to those who are converted from infidelity to the *Catholic Church*. Thus Pope Innocent III., in his celebrated constitution *Quanto*,[4] decrees: "Si enim alter infidelium conjugum *ad fidem* CATHOLICAM convertatur, altero vel nullo modo, vel non sine blasphemia divini nominis, etc., ei cohabitare volente: qui relinquitur, ad secunda, si voluerit vota transibit; et in hoc casu intelligimus quod ait Apostolus, *si infidelis discedit, discedat*." Pope Gregory XIII., in his Const. *Populis ac Nationibus*, 25 Januar. 1585, applies the Pauline privilege only to *populis ac nationibus nuper* ex gentilitatis errore AD FIDEM CATHOLICAM CONVERSIS.[5] So also the S. C. C., January 23, 1603, in replying to a bishop in regard to applying the Pauline privilege, decided: "Minime posse praedictos *ad* VERAM FIDEM *conversos*, accipere alias fideles uxores, nisi prius constiterit, utrum primae voluerint cum eis permanere vel non."[6]

317. Besides, it would seem unreasonable that heretics who deprived themselves, of their own free will, of member-

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[1] We say Pauline privilege, not because it was enacted by St. Paul, but because it was promulgated by him. God Himself granted the privilege.

[2] Perrone, l. c. p. 324. [3] Feije, l. c. n. 502. [4] Cap. 7 de Divort. (iv. 19).

[5] Apud Feije, de Imp. n. 474. [6] Apud Feije, l. c. n. 474, p. 342.

ship with the true Church, and of the privileges annexed to such membership, should be entitled to the privileges granted by Our Lord, through St. Paul, to the members of the true Church and in favor of the true faith.[1]

318. Q. At what time and how is the marriage contracted in infidelity dissolved, in the case?

A. 1° This marriage is not dissolved by the conversion and baptism of one of the two unbaptized spouses, but only the moment another marriage is validly contracted.[2]

2° From this it follows also that if, after one of the infidel spouses has been converted, the other is also converted and baptized, and that before the one first converted has validly contracted another marriage, the marriage contracted in infidelity becomes *verum et ratum*,[3] and consequently the two spouses are even to be compelled, if need be, to live together as husband and wife. Thus Pope Innocent III. decrees:[4] "Quod si conversum ad fidem, et illa conversa sequatur, antequam propter causas praedictas, legitimum ille ducat uxorem, eam recipere compelletur."[5]

319. Q. What is the juridical or canonical form of the interpellation?

A. Card. Kutschker, de Matr. vol. i. p. 392, gives the following formula: "Commissione et mandato R̃mi DD. Episcopi, etc. Tenore praesentium et ad instantiam Mariae N. neophytae ante baptismum vocatae Rachelis, requiritur, interpellatur ac monetur Isaac Alpronus, Judaeus, maritus ante baptismum ejusdem Rachelis, et nunc Mariae (nomen baptismatis), ut in termino dierum triginta ab intimatione praesenti immediate decurrentium ac numerandorum, quorum decem pro primo, alios decem pro secundo, et reliquos decem dies pro tertio et ultimo termino assignamus, debet in actis hujus Curiae se exprimere ac declare an velit se con-

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[1] Card. Kutschker, l. c. vol. i. p. 387; cf. Feije, de Imp. n. 502.

[2] Feije, l. c. n. 498.

[3] Ib. n. 499.

[4] Cap. 8 de Divort. (iv. 19).

[5] Cf. Card. Kutschker, l. c. vol. pp. 366, 367.

vertere ad sanctam fidem Christianam, sectam judaicam deserere ac sacrum baptisma corde sincero suscipere, prout, ipsa Maria olim uxor sua, fecit, et prout enixe facere rogat pro salute animae suae, interpellat et requirit; aut velit saltem cum dicta uxore sua pacifice, sine ullo subversionis conatu, sine Christianae religionis irrisione cohabitare ac vivere, prout ipsa eum similiter rogat, monet ac interpellat. Alias dictis triginta diebus transactis, et ad fidem Christianam non se convertente et se conversurum non declarante, aut recusante cum dicta uxore tranquille, sine ulla vexatione et ad judaicos errores sollicitatione, ac sine Christianae religionis contemptu saltem cohabitare et convivere, ipsa Maria ad secundas nuptias cum alio fideli transibit, vel religionem ingredietur, prout magis in Domino pro propria salute aeterna putaverit expedire. Et citetur praedictus Isaac Alpronus—Judaeus, ac citatus intelligatur eodem termino triginta dierum transacto, coram D. S. Illm̃a et Rm̃a ad audiendam ita sententiari, et quodcuque decretum necessarium et opportunum super praemissis pronuntiari. Non solum, etc. Verum, etc. In quorum fidem, etc. Datum ex Cancellaria Episcopali N. die, etc.; anno, etc.

320. *Practical observation for the United States.*—Kenrick writes:[1] "In hac regione si contigerit quimpiam ad fidem converti, qui non fuerit baptizatus, conjugio tamen cum altero haud baptizato junctus, omnis opera adhibenda erit ut consors retineatur, absque fidei et pietatis detrimento: nam libertate ad nova vota transeundi lex civilis frui vetat, nisi iis qui divortio (civili) separati sunt." The civil law, with us, does not recognize the Pauline privilege. Moreover, this civil law, in no case, recognizes the dissolution of the *vinculum* of a marriage, except where such dissolution — called absolute divorce—is obtained in the secular courts.

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[1] Theol. Mor. tract. 21, n. 48.

321. Hence if a convert, in the case under discussion, wished to marry another person, under the Pauline privilege, it would be prudent to obtain first an absolute divorce in the secular court before proceeding to another marriage. Nor is it very difficult—sad to say—to procure an absolute divorce in the secular courts. Thus in most States absolute divorces are granted for adultery, abandonment and wilful desertion for one or two years; for conviction of an infamous crime; imprisonment for two years; extreme cruelty; habitual indulgence of violent and ungovernable temper; habitual drunkenness for one year; for personal indignities and outrages which render life burdensome; refusal or neglect of the husband to provide for the wife; when it is evident that the parties cannot live in peace and happiness together; etc., etc.[1]

Art. IX.

IMPEDIMENT ARISING FROM SACRED ORDERS.

(*Impedimentum ordinis.*)

322. The obligation, incumbent upon the clergy, of observing chastity, and therefore of abstaining from marriage, or keeping the law of celibacy, has existed in the Church from the earliest times. However, for a long time, the marriages of clergymen, though forbidden and illicit, were nevertheless valid.[2] Hence it was found very difficult to enforce the law of celibacy, as appears only too well from the constant struggles of the immortal Pontiff, Gregory VII. Consequently, to prevent the marriages of ecclesiastics more efficaciously, the first general Council of the Lateran, held in 1123 under Pope Callistus II.,[3] and the second general Council of the Lateran, held in 1139 under Pope Alexander III.,[4] decreed that if ecclesiastics did marry not-

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[1] Wells, pp. 79, 80.

[2] Schulte, Eher. pp. 207, 208.

[3] Can. 40, C. 27, Q. 1.

[4] Cap. 1 de Cler. Conj. (iii. 3).

withstanding the prohibition to do so, they must be separated from their wives. From that time downward, the marriages of ecclesiastics in higher orders were regarded as invalid. The Council of Trent[1] expressly decreed that they should be invalid.

323. Q. What, then, is the impediment of orders?

A. 1° It is this, that a person who has received sacred orders cannot validly marry. By sacred orders are here meant the subdeaconship, deaconship, and upwards.[2]

324. 2° This impediment is solely *juris ecclesiastici*, not *juris naturalis* or *divini positivi*. Consequently it admits of dispensation by the Pope. As a matter of fact, the Supreme Pontiffs have granted dispensations from this impediment and allowed ecclesiastics in higher orders to marry, or to remain married, in certain cases, where very grave reasons demanded it. Thus Pope Julius III. granted this dispensation to priests in England who had married when England first became Protestant. Pius VII. also granted it to the ecclesiastics in France who had married during the Revolution.[3]

325. In the United Greek Church (i.e., the Greek Church united with the Catholic Church) a general dispensation exists, in the sense that Greeks and other Orientals cannot, at least licitly, marry after they have once received sacred orders, but that those who are already married may receive sacred orders excepting the episcopal, and may retain their wives after ordination.[4]

ART. X.

SOLEMN VOWS.

(*Votum.*)

326. It lies in the very nature of things that a person who makes a vow or promise to observe chastity binds himself, of his own free will, not to marry. Hence if a person

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[1] Sess. 24, Can. 9 de Sacr. Matr.

[2] Ib.; Bonif. VIII. cap. unic. vot. et vot. redempt. in 6° (iii. 15).

[3] Schulte, Eher. p. 210.

[4] Feije, l. c. n. 508.

made the vow to observe chastity all his lifetime (*votum perpetuae castitatis*), he ought never to marry unless lawfully absolved from his vow. And if he nevertheless did marry without a dispensation, his marriage would be illicit and sinful. But would it be also invalid? No, except in certain cases specified by the positive law of the Church. We shall now briefly discuss these cases.

327. Q. When does the vow of chastity annul marriage, or what is the impediment arising from the vow of chastity?

A. The only vow of chastity which annuls marriage is the solemn vow of chastity taken by a person, male or female, ecclesiastic or layman, when he or she makes the solemn profession in a religious order approved by the Church.[1] We say *solemn vows;* consequently simple vows, even though perpetual, made in a religious community, do not annul marriage, except in the case of the simple vows made by Jesuits after a novitiate of two years. The vows of nearly all religious congregations of women in this country, v.g., Sisters of Charity, of Mercy, etc., are simple, and therefore do not annul marriage.

328. Q. Is the impediment in question *juris ecclesiastici* or *juris naturalis* or *divini positivi?*

A. It is merely *juris ecclesiastici.*[2] Consequently this impediment is dispensable by the Church.

ART. XI.

CLANDESTINITY OR SECRECY.

(*Clandestinitas.*)

329. All contracts consist essentially in the free consent of the contracting parties. Yet when they are made in an occult manner, v.g., orally and without any witnesses, they cannot be proved, and therefore depend for their force

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[1] Cap. unic. de vot. et vot. redempt. in 6° (iii. 15); Conc. Trid. sess. 24, Can. 9, de Sacr. Matr.

[2] Cap. unic. de vot. et vot. red. in 6°.

simply upon the good-will or conscience of the parties. Hence the secular law refuses to recognize as valid secular contracts unless they are made in such a manner as to be provable, v.g., in writing or in the presence of two witnesses.

330. Marriage, like other contracts, consists essentially in the free consent of the contracting couple. Consequently, apart from the positive law of the Church, all that is required to constitute a valid marriage is that the consent shall be given freely. It matters not whether it be given publicly or privately, in the presence or absence of any witnesses or of a priest. But it is also clear that marriages which are contracted in a secret, occult manner, so that they cannot be proved *in foro externo*, depend entirely upon the caprice of the married couple, who may deny such a marriage and then contract a second or third. For these and other reasons the Church has at all times detested and prohibited secret or occult marriages,[1] that is, marriages contracted without witnesses, by the sole consent of the parties.

331. In other words, it has ever been the strict law and practice of the Church that marriages should be contracted publicly, that is, that on two or three Sundays beforehand a public announcement should be made in the church of the proposed marriage (publication of banns),[2] and that thereupon the marriage should be solemnized publicly in the church, before the priest and several witnesses, according to the ritual and with the ceremonies of the Church, so that the marriage might be easily and fully proven *in foro externo*.[3] Yet, prior to the Council of Trent, marriages which were celebrated in a secret manner, that is, without witnesses, though sinful, were nevertheless valid.[4]

332. However, it was found that the law, in this shape,

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[1] Conc. Trid. sess. 24, Cap. 1 de Ref. matr.

[2] Cap. 3 de cland. desp. (IV. 3).

[3] Can. 1, 2, 3, 4, 5, 6, Causa 30, Q. 5.

[4] Bened. XIV. De Syn. lib. 13, cap. 23, n. 13.

did not fully accomplish its purpose. As long as a marriage, though contracted in an occult manner, was merely illicit and sinful, and not invalid, there were many who continued to contract marriage without any witnesses, etc., and then, when they grew tired of the bond, they denied the secret marriage and contracted a second or even a third marriage and remained in this state of adultery to the end of their lives. This was the state of things prior to the Council of Trent. This Council, in order to supply a more effective remedy, enacted that, in future, all marriages that were contracted in a clandestine or occult manner, that is, without the presence of the parish priest and of two or three witnesses, were not merely forbidden and illicit, but moreover invalid.

333. Q. What, then, is the diriment impediment arising from secrecy or clandestinity in the celebration of the marriage?

A. It consists in this, that the parties get married in an occult manner, that is, not in the presence of their own parish priest and two witnesses. The Council of Trent states this impediment thus: "Those who shall attempt to contract marriage otherwise than in the presence of the parish priest, or of some other priest by permission of the said parish priest, or of the ordinary, and in the presence of two or three witnesses, the holy Synod renders such wholly incapable of thus contracting, and declares such contracts invalid and null." We say, *their own parish priest;* consequently not every parish priest is meant, but only the parish priest of the contracting parties, and that on pain of invalidity of the marriage. Now persons become parishioners, and therefore belong to a parish priest, when they live in his parish, that is, when they have a domicile or *quasi*-domicile in it.

334. The aim and object which the Council of Trent had in view in making the above law was, as Card. Pallavicini writes, to obtain, in an efficient manner, full and canonical

proof of the marriage contracted,[1] and thus to prevent second or even third marriages while the first was still in existence. Hence it requires three witnesses in order that the marriage may be valid, namely, the parish priest and two other witnesses. Thus the Council provided for abundant and more than sufficient canonical proof of the marriage.

335. Nay, the Council went even farther. Witnesses may die, and thus their testimony be lost. But documents and writings do not die; hence they constitute *permanent, undying* proof. Therefore the Council, in order to provide for an enduring proof of the marriage,[2] commands the parish priest to make a *written* record of the marriage, as follows: "The parish priest shall have a book, which he shall keep carefully by him, in which he shall register the names of the persons married and of the witnesses, and the day on which, and the place where, the marriage was contracted."[3] This provision, though obligatory on the parish priest, is not required to the validity of the marriage.

336. Q. Is the above impediment arising from secrecy or clandestinity in force all over the world at present?

A. The Council of Trent itself makes the following proviso as a condition of the binding force of the impediment: "It enjoins on all Ordinaries that they make it their care that this decree be published in *every parish church* of their respective dioceses, . . . and that this decree shall begin to be in force in each parish at the expiration of thirty days, to be counted from the day of its publication made in said parish."[4] A general publication, therefore, in a diocese or country is not sufficient; a *particular* publication in *each* and *every* parish is required. Consequently, when it has

[1] Card. Kutschker, l. c. vol. iv. pp. 352, 353, 354.

[2] Ib.

[3] Conc. Trid. sess. 24, cap. I de Ref. matr.

[4] Ib.

never been published in a parish, either formally or presumptively, it does not bind there.

337. We say *presumptively;* for, besides a formal or express publication, there is also a presumptive one. In other words, when the Tridentine decree, as explained, has been observed, as such, for a considerable length of time, v.g., for one year or two,[1] in a parish, then the law of the Church presumes, from this very observance, that it was duly and formally published there, and consequently holds it to be binding. Hence the Tridentine decree *Tametsi* binds (*a*) where it has been formally published; (*b*) where it is being observed, even though it was never formally published.

338. On the other hand, even where it has been published it ceases to be obligatory (*a*) when it has fallen into desuetude; (*b*) when its observance becomes universally impossible in a parish for a time, v.g., where the parishioners have no safe access to their parish priest for a month; (*c*) when a papal dispensation intervenes.[2]

339. Q. In what parts of the United States is the above Tridentine law promulgated or observed, and therefore in force?

A. It is not in force in *most* of our dioceses. However, it is binding in *some.* In what places, then, is it binding? See our Elements, vol. i. p. 432, 8th ed. The Declaration of Pope Benedict XIV., issued for Holland in 1741, has been extended by the Holy See to all parts of this country where the Tridentine law is in force, save to the province of Santa Fé.[3]

340. Consequently, in all those places where the law of the Council of Trent, on this matter, is not in force, marriages are valid, though illicit, when they are contracted by

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[1] Card. Kutschker, l. c. vol. i. p. 457; vol. iv. pp. 356, 357.

[2] Lehmkuhl, Comp. p. 520; Card. Kutschker, l. c. vol. iv. p. 359.

[3] Conc. Pl. Balt. III. p. cviii.

the sole consent of the parties, without a priest or witnesses, just as they were prior to the Council of Trent. We say, *though illicit;* for, as in the times which preceded the Council of Trent, so at the present day, also among us, these occult marriages are forbidden, both by the general law of the Church and by our local ecclesiastical law, under pain of mortal sin, chiefly because of the difficulty of *proving* them.

341. According to our secular laws, enacted by the various States of the Union, no particular ceremony is requisite, nor is it required, as a rule, that the marriage shall be performed by or in the presence of any particular person, magistrate, or clergyman, the sole consent of the contracting parties being sufficient. We say, *as a rule;* for in *some* of the States the marriage *must* be performed by a clergyman or a magistrate.[1] While, however, the secular law, with us, does not, generally speaking, consider marriages invalid which are contracted without a clergyman or a magistrate, and without witnesses, yet neither does it regard such secret marriages with favor. In fact, the secular law, with us, seeks, by all means in its power, to induce people to get married before a clergyman or a magistrate and at least two witnesses, so that the marriage may be susceptible of complete legal proof. For this purpose, also, the secular law, nearly all over the country, enacts that clergymen or civil magistrates who solemnize marriages shall keep an accurate record of these marriages, and shall transmit a copy of each marriage record to the proper civil authority. Thus it will be seen that the State, with us, also disapproves, like the Church, of secret or occult marriages.

342. Q. How are clandestine marriages proved *in foro externo?*

A. 1° Clandestine marriages may be secret or occult in two ways: (*a*) either altogether, namely, when the marital consent is given without the priest or witnesses; (*b*) partially, when the consent is given without the presence of the priest, but yet before two or more witnesses. We have seen that these marriages, though forbidden and sinful, are valid in places where the Tridentine decree *Tametsi* is not in force. But how can they be proved *in foro externo?* In other words, how can it be proved *in foro externo* that a couple, in the case, mutually gave their consent to be man and wife? The celebration or contracting of a marriage is a *fact*, which is not presumed, and is to be proven, like all other facts. Nay, the law of the Church decrees that marriages contracted without the priest and witnesses, being forbidden, sinful, and detested, shall be presumed as mere fornications, until the contrary is proved, that is, until it is proved that the marital consent was really given.[1]

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[1] Wells, p. 78.

343. 2° Hence the following rules may be laid down. When the marriage was contracted before witnesses—though not before the priest—their testimony or deposition is to be received, and by it the contracting of the marriage can be proved, even though both spouses deny it.[2]

344. 3° If the marriage was contracted without any witnesses whatever, then three cases can happen: (*a*) Both spouses acknowledge the contracting of the marriage, and then this joint affirmation constitutes full proof of the marriage.[3] The only exception that occurs to this rule is where one or both of the parties, after the above alleged clandestine marriage, have publicly contracted a different marriage. For, in the latter case, the mere affirmation of the parties, even though made under oath, is not admitted as proof of the clandestine marriage as against the subsequent public marriage.[4]

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[1] Can. aliter legitimum 1, C. 30, Q. 5.

[2] Arg. cap. 2 de cland. desp. (iv. 3); Gasparri, l. c. n. 875.

[3] Alex. III. cap. 2 de cland. desp. (iv. 3); Gasparri, n. 876.

[4] Bened. XIV. de Syn. l. 13, cap. 23, n. 12.

345. (*b*) Both spouses deny the celebration of the marriage, or the giving of their marriage consent. In this case, the marriage is to be regarded as not proved, and therefore as not contracted, and the spouses are not to be compelled to acknowledge each other as husband and wife, but are to be permitted to contract a new marriage.[1]

346. (*c*) Finally, one of the spouses affirms and the other denies the marriage. In this case, the spouse affirming the existence of the marriage is bound to prove it.[2] If he fails to prove it, the parties are to be allowed to contract a new marriage.[3] The spouse affirming the marriage can prove it, v.g., (*a*) by letters of the other spouse admitting the marriage; (*b*) by indirect or hearsay witnesses; (*c*) by presumptions or circumstantial evidence, v.g., the fact that the parties lived together as man and wife, and publicly acknowledged that they were man and wife.[4]

347. Here we call attention to a presumption which formerly constituted full proof of a clandestine marriage in places where the Tridentine decree *Tametsi* did not obtain. We mean the inference formerly drawn by the law itself from the promise of marriage and the subsequent *copula*. In other words, where it was certain or proved *in foro externo* that between a man and a woman there was a valid promise of marriage, and that it was followed by the *copula*, the law of the Church itself, *in foro externo*, inferred absolutely, from these two facts, that the spouses mutually agreed to be husband and wife, and that consequently they were married.

348. We say, *in places where the Tridentine decree "Tametsi" did not obtain.* For where this decree is in force no marriage is valid unless it has been contracted before the parish priest and two witnesses. Hence in places where

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[1] Cap. 2 de cland. desp. (iv. 3).

[2] Cap. 1 de cland. desp. (iv. 3).

[3] Gasparri, l. c. n. 878.

[4] Card. Kutschker, l. c. vol. iv. p. 358.

this decree is observed the law of the Church does not, either *in foro interno* or *in foro externo*, recognize or regard as a valid marriage the betrothal followed by the *copula*.

349. We say, *formerly;* since at present this presumption *juris et de jure*, or absolutely conclusive inference of the marital consent from the betrothal and subsequent *copula*, exists no longer. For on the 15th of February, 1892, Pope Leo XIII. abrogated the law of the Church on this head, and decreed "ut deinceps illis in locis in quibus conjugia clandestina pro validis" (that is, in places where the decree *Tametsi* is not observed), "a quibusvis judicibus ecclesiasticis, in quorum foro causas ejusmodi matrimoniales agitari et judicari contigerit, copula carnalis sponsalibus superveniens non amplius ex juris praesumptione conjugalis contractus censeatur, nec pro legitimo matrimonio agnoscatur seu declaretur."[1]

350. However, by this decree the Supreme Pontiff does not make the observance of the decree *Tametsi* obligatory in places where it does not obtain at present. Thus Pope Leo XIII., in his above decree of Feb. 15, 1892, says expressly: "Hujus tamen auctoritate Decreti induci nolumus necessitatem formae Tridentinae servandae ad matrimonii validitatem, ubi illa forma modo non viget."[2] Consequently, in places where the Tridentine decree *Tametsi* does not obtain, clandestine marriages, that is, marriages contracted by the sole consent of the parties, without the priest or witnesses, are now valid, though illicit, just as they were prior to the above decree of Pope Leo XIII. Hence also now, as before the decree of Leo XIII., the betrothal followed by *copula carnalis* constitutes a valid marriage, provided the *copula* was exercised *cum affectu maritali*. For the marital consent can be given either by words or by other external signs, v.g., by the *copula carnalis*.

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[1] Acta S. Sedis, anno 1892, p. 442.

[2] Ib.

351. But the difference in the law of the Church, as it existed prior to Pope Leo's decree and as it exists now, is this: Before the decree, the betrothal and subsequent *copula*, if established as certain, constituted of themselves, *in foro externo*, an absolutely conclusive presumption that there was *affectus maritalis*, or that there was marital consent, even though, as a matter of fact, there was not any such *affectus*. Whereas, at present, the *copula* following upon betrothal, even where both are fully proved, does not allow of the absolute inference, admitting no proof to the contrary, that there was marital consent, though it still allows of the simple inference, admitting proof to the contrary, that there was such consent. Therefore if, in places where the decree *Tametsi* does not obtain, a party wishes to prove that a valid marriage was contracted by betrothal and subsequent *copula*, he would be obliged to show (*a*) not only that there was a valid betrothal and a subsequent *copula perfecta*, (*b*) but also that there was *affectus maritalis*, or that the parties intended to be husband and wife.

352. Q. How are secret marriages proved in our secular courts?

A. The proof is similar to that in the ecclesiastical courts, as just described. Thus Crosby, p. 216, says: "For civil purposes, common reputation, cohabitation, or the admissions of the parties themselves, constitute sufficient evidence of marriage."

353. Q. Does the Tridentine decree *Tametsi* bind Protestants or baptized non-Catholics?

A. We premise: We say *baptized non-Catholics*. For the decree *Tametsi* establishes an impediment which is merely *juris ecclesiastici*, and therefore does not bind unbaptized persons.

We now answer: We have seen that all baptized Protestants are subject to the laws of the Church, and are therefore also bound by the impediments which are merely *juris positivi ecclesiae*, and consequently also by the decree *Tametsi*.

354. But it should be borne in mind, as we have said, that the Tridentine decree has this peculiarity, that, in order to bind in any particular parish, *it must be published separately, and especially in such parish.* Moreover, even where it has been published, but where it has not been observed for a time, or where its observance is morally or physically impossible to the parishioners in general, it ceases to be obligatory. Now from all this it will be seen that the Tridentine decree does not, as a rule, bind Protestants. For, as a matter of fact, it has either (*a*) never been published in their churches or congregations, or (*b*) it has never been observed among them, or (*c*) its observance is morally impossible among them, since their ignorance of the law, or their religious prejudices, or the prohibition of the Church to communicate with heretics *in sacris* makes it impossible for them to go to and get married by the Catholic parish priest of the place.

355. In fact, as Card. Pallavicini states in his history of the Council of Trent,[1] that Council made the proviso that its decree should not bind in a particular parish unless it was specially published in it, chiefly out of consideration for the evils that would otherwise follow among Protestants. The Jesuit theologian Lainez represented to the Council that the Protestants would certainly refuse to accept or observe the decree, and that thus their marriages would be concubinages. This made a great impression on the Fathers of Trent. In consequence they made the proviso that the law should not bind if it was not published. They foresaw, of course, that the Protestants would never publish it, and that thus they would not be bound by it.[2]

356. It was on these grounds that Pope Benedict XIV.[3] declared: "Matrimonia quae in locis foederatorum Ordinum dominio in Belgio subjectis iniri solent, sive inter

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[1] Lib. 22, cap. 4.

[2] Card. Kutschker, l. c. vol. i. pp. 455, 456.

[3] Const. *Matrimonia*, §§ 2, 3, 4 Nov. 1714 (Bullar. Bened. XIV. vol. i. p. 113).

haereticos ex utraque parte, sive inter haereticum ex una parte virum et Catholicam feminam ex alia, aut vice versa, non servata forma a Sacro Tridentino Concilio praescripta . . . pro validis habenda esse." From this it will be seen that the decision of Benedict XIV. is not a dispensation, or derogation of the law, granted to heretics, but a declaration that it does not bind them, owing to the causes and circumstances above explained.[1] Consequently it is safe to infer that wherever the condition of things is the same as it was in Holland at the time, there also is applicable what Benedict XIV. declared for Holland. But practically it will always remain doubtful whether the conditions and circumstances of a place are the same as those in Holland at the time. Hence the Holy See has frequently declared that the Declaration of Benedict XIV. for Holland and Belgium does not obtain in other countries, except when the Holy See itself extends it to them.[2]

357. *Marriages of conscience.*—In connection with *clandestine* marriages we shall here say a few words concerning marriages of conscience. These two kinds of marriages, though similar to, are yet distinct and different from, each other. A clandestine marriage is one which is celebrated in an absolutely secret manner, that is, without any witnesses whatever or priest. A marriage of conscience is one which is contracted indeed before the priest and two witnesses, but yet without any previous publication of the banns, and with the understanding and condition that it shall be kept entirely secret, both by the officiating priest and by the attendant witnesses. Nay, more. In order to prevent the possibility of the secret being violated, the marriage record should not be entered in the parochial register, but in a special secret register to be kept by the bishop. For this purpose, the priest officiating should send the written

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[1] Feije, l. c. n. 308.

[2] Ib.

record of the marriage—namely, the names of the spouses, of the witnesses, of the priest; the day and place of the marriage—to the bishop, to be recorded in the secret register.[1] The secrecy of the marriage consists, not in the absence of witnesses, but in the secrecy to be observed by all concerned in it.

358. Q. Are marriages of conscience licit and valid?

A. 1° They are allowed, though only for very grave reasons; because the Church abhors anything like secrecy in marriages. Hence such marriages should be contracted only by the bishop's permission. We say, *for very grave reasons;* such reasons are, v.g., where a man and a woman have lived together a long time as concubinaries, and yet are *publicly reputed* to be married; or where two persons wish to marry who differ greatly in their respective stations in life, and who therefore wish to conceal their marriage in order to escape ridicule and great annoyance.

2° They are valid, of course, in places where the Tridentine decree *Tametsi* is not in force, as no priest or witnesses whatever are required there to the validity of the marriage. They are valid also in places where the Tridentine decree is in force, since its prescriptions are complied with, in that they are contracted before the parish priest, or other priest deputed by the bishop, and two witnesses.

359. These marriages of conscience are not in vogue everywhere. Card. Kutschker[2] says they can scarcely ever occur in Austria. There seems to be little occasion for them in the United States. For, even where there are grave causes for keeping a marriage secret, the secrecy can be easily secured, without sending the record of the marriage to the bishop for entry in a secret register, and without

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[1] Bened. XIV., const. *Satis vobis*, 17 Nov. 1741; Card. Kutschker, l. c. vol. iv. pp. 683–690.

[2] Eherecht, vol. iv. p. 689.

omitting it from the parochial marriage-register. For the priest will see the obligation of keeping the marriage secret, so as not, v.g., to defame the parties, or occasion them great annoyance. Witnesses can be selected who will not disclose the marriage. The parochial registers are in the custody of the rector, and therefore need not be made public.

ART. XII.

ADULTERY AND MURDER.

(*Impedimentum criminis.*)

360. Marriage is a union for life. It imposes life-long duties. Now this life-long union and these life-long duties are apt to become burdensome. Passions will goad parties on to break through this barrier. Married people, becoming tired of each other, will try to find a way out of the marriage, even by committing heinous crimes, such as adultery and murder. Hence, in order to remove the temptation or the motive to commit such crimes, the Church invalidates the marriage between partners in certain crimes which are committed with a view to breaking up an existing marriage and contracting a new one.[1] There are two crimes for which the law of the Church, as in force at present, annuls a marriage: 1° Adultery; 2° Murder. We shall now briefly discuss each of them.

361. Q. What is the impediment arising from adultery, or when and between whom does adultery annul marriage?

A. Adultery annuls marriage between the adulterer and the adulteress in these three cases: when the guilty parties, besides committing adultery, (*a*) promise to marry each other as soon as the innocent spouse dies, or (*b*) actually contract marriage with each other while the innocent spouse is still living, or (*c*) when one of the adulterers kills the innocent spouse with or without the knowledge of the other adulterer.[1]

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[1] Schulte, Eherecht, p. 307.

362. The adultery in all these cases must be true, formal, and consummated. It must be *true;* that is, both or at least one of the fornicators must be validly married; otherwise there would be fornication, not adultery. It must be *formal;* that is, each of the two fornicators must be aware that the other with whom he or she sins is married. It must be *consummated;* that is, there must be a *copula perfecta.* However, once the copula itself is shown to have taken place, it is always presumed perfect, in the external or judicial forum of the Church. The promise of marriage, spoken of above, must be true, external, and mutual.[2]

363. Q. What is the impediment arising from murder, or when and between whom does murder annul marriage?

A. When a husband or a wife is killed by means of a conspiracy existing between the other spouse and a third party, such murder annuls a marriage between the two conspirators, provided they did the killing for the purpose of marrying each other after the murder of the other spouse.[3] We say, "by means of a *conspiracy;*" because both persons must combine in bringing about the death of the spouse. For, as we have seen, where the murder of a spouse is caused by one person only, without the aid and concurrence of the other, it does not annul the marriage, unless it is also accompanied by adultery. Only when there is a conspiracy does murder alone, without adultery, annul marriage.

364. We have said, *provided they did the killing for the purpose of marrying,* etc. This intention is sufficiently proven *in foro externo* when it is shown that the murder was preceded by certain signs indicating this intention, v.g., gifts, familiarities, love-letters, etc., between the guilty pair.

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[1] Cap. 2, 3, 4, 6, 7, de eo qui duxit (iv. 7).

[2] Mansella, l. c. p. 156.

[3] Cap. 1, de Conv. infid. (iii. 33).

Nay, this intention is, according to many, to be presumed from the very fact that the guilty pair wish to marry each other after the murder.[1]

365. Q. What else is to be noted in regard to the impediment in question?

A. 1° The impediment is solely *juris ecclesiastici*, and consequently does not bind unbaptized persons. It binds, however, when, of the two parties guilty of the crimes, one is baptized and the other is not.[2]

2° The impediment, being purely *juris ecclesiastici*, always admits of dispensation.[3]

3° Whenever the crime of adultery or murder, in the above cases, is proved, the law presumes, by that very fact, that it was done by the parties for the purpose of marrying each other. In other words, whenever the crime of adultery, as set forth above, is proved, then the law presumes that either a promise of marriage intervened or that an attempted marriage occurred. Likewise, where the murder of a spouse, as explained, is proved, the law presumes that it was committed with the intention of marrying the surviving spouse. The presumption, however, in all these cases, holds only in the external or judicial forum of the church.[4]

4° The existence of this impediment in a particular case may be easily suspected at times. Thus when a widow, or a widower, whose husband, or wife, has but recently died, applies, soon after such death, to the priest to get married to a person that lived in the same house with him or her before the death, the priest may justly suspect that the widow, or the widower, was unduly familiar with the one he, or she, now wishes to marry. In such a case the priest should prudently ascertain whether the impediment really exists, by asking, for instance: "How is it that you wish to get married so soon after the death of your spouse? Did you think of this marriage before the death of your wife, or husband? Did you promise to marry the present party, and were you unduly familiar with him, or her, during the lifetime of your recently-deceased spouse?"[1]

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[1] Gasparri, l. c. n. 644.

[2] Cap 1 de Conv. Infid. (iii. 33); Card. Kutschker, l. c. vol. iii. p. 439.

[3] Card. Kutschker, vol. iii. p. 440.

[4] Ib. p. 441.

5° Some think that the impediment is not contracted when the parties guilty of the crime do not know that the impediment is annexed to the crime, or that the above crimes constitute a diriment impediment. They argue that the impediment is a punishment. However, this opinion is universally rejected, because the impediment is primarily a disability, and only secondarily a punishment.[2]

ART. XIII.

ABDUCTION.

(*Raptus.*)

366. Freedom in the giving of the consent is the very essence of marriage. For marriage is nothing else than the *free* consent to be man and wife. Hence the consent must be given with entire freedom, not only internally, but also *externally.* Consequently the parties contracting marriage should be externally in such circumstances and surroundings as to be able to give their consent without any unjust outside pressure or constraint. It is for this reason that any marriage contracted under grave fear produced by external constraint, of whatever kind, is invalid *ex impedimento vis et metus*, as we have seen. Now it is plain that the carrying away of a woman by force, or even by fraud and persuasion, is opposed to the freedom of consent, and therefore annuls the marriage, as we shall now see.[3] Abduction is, therefore, akin to fear and violence. Yet the two are not to

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[1] Card. Kutschker, vol. iii. p. 441.

[2] Feije, l. c. n. 456.

[3] Schulte, Eher. p. 300.

be confounded. Thus, among other differences between the impediment of fear (*vis et metus*) and the impediment of abduction (*raptus*), there is this one: the impediment of fear ceases to annul the marriage as soon as the fear comes to an end and the party does not reclaim; whereas, in abduction, the marriage contracted by the woman, even though with her consent, while under the abductor's control, remains invalid, and is not rendered valid by this consent.[1]

367. Q. What is the diriment impediment arising from abduction, or what kind of abduction annuls marriage?

A. By abduction (*raptus*), as a diriment impediment, is understood the carrying or taking away of a woman by force or threats, or by fraud and deceit, or even by persuasion, from a safe place to another place, where she is kept under the power of the abductor, for the purpose of contracting marriage between her and the abductor.[2] The Instr. Austr. § 19 says: "Mulier, quae matrimonium ineundi causa rapta fuerit, cum raptore, quamdiu in ejus potestate manserit, matrimonium valide contrahere nequit. Rapta censenda est mulier, quae violentia ipsi illata vel abducitur, vel in loco, ad quem dolo allecta est, detinetur; necnon ea, quae a viro, cui ante facinus rite desponsata haud fuit, ipsa licet consentiente, insciis tamen vel invitis parentibus seu tutoribus abducitur."

368. We say, *the carrying away from a safe place to another;* in other words, the woman must be taken from one place where she is under no constraint to another which is morally distinct and where she is under restraint. Hence it is not sufficient if she be taken from one room to another in her own house.[3] But it is sufficient if she be taken from one floor to another of the same house, each floor being occupied by a different family, as happens in tenement-houses.

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[1] Feije, l. c. n. 146.

[2] Mansella, l. c. p. 16.

[3] Heiss, de Matr. p. 168.

369. It is not required that the abductor should himself carry out the abduction; it is sufficient if he does it through others. Nor is it necessary that the woman be detained in the house where the abductor lives; it is sufficient if she be detained in any house in such a manner as to be under the control or influence of the abductor. In fact, it is sufficient if she be lured from her own home and then prevented from returning to it, and thus remain under the control of the abductor.

370. We say secondly, *of a woman;* hence the abduction of a *man* does not annul the marriage. For the Council of Trent,[1] which introduced this impediment, speaks of the abduction of women only.

371. We say, *by force or violently.* It is therefore plain that abduction necessarily supposes that the woman is carried off *against her will.* For violence or force, physical or moral, is not done to a person who freely consents to the act. From this it also follows that if a woman is abducted with her own consent, that is, if she freely consents to being abducted in order to get married, there is no abduction, but merely an elopement. But the consent of the woman abducted is never presumed by the law of the Church. On the contrary, her dissent or unwillingness is always presumed *in foro externo* by ecclesiastical law,[2] though only by *praesumptio juris*, not by *praesumptio juris et de jure.* Consequently the marriage, if contracted between the abductor and the abducted woman while the latter was under the control of the former, is regarded as invalid, by the law of the Church, until the consent of the woman has been *fully and canonically proved.*[3]

372. In other words, the law of the Church always pre-

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[1] Sess. 24, Cap. 6, de Ref. matr.

[2] This holds especially with regard to a woman who is under the control of her parents or guardians. (Feije, l. c. n. 171.)

[3] Feije, l. c. n. 160, 164, 165.

sumes that both the abduction and the marriage contracted between the abductor and the abducted woman, while the latter was under the former's control, took place without the woman's consent. Consequently, in order to show the validity of such a marriage, it must be proven fully and canonically that the woman consented both to the abduction and to the marriage. We say, *both to the abduction*, etc.; for the law of the Church is that if a woman is abducted against her will, and then consents to marry and actually does marry the abductor while under his control, such marriage, though contracted with the woman's consent, is invalid.[1] Hence it is necessary to prove that she consented both to the abduction and to the marriage.

373. Now, in the *forum externum*, this consent of the woman both to the abduction and to the marriage can be proved chiefly from the fact that the parties were, previous to the abduction, engaged or betrothed to one another, or kept company with each other, with a view to marriage,[2] or had taken steps to get married.[3]

374. Again, by *force* or *violence* is here meant not merely *physical* but also *moral* force or violence, such as threats, etc. Hence if a woman is induced to agree to the abduction by grave fear caused by threats of the abductor, or by his misrepresentations, the marriage is invalid. Nay, according to many, the same applies to fraud, deceit, or false representations. In other words, many authors hold that if the abductor induces the woman, by deceit or false statements, to follow him, and to get married, the marriage is invalid, owing to the impediment of abduction, or *raptus*.[4]

375. Q. Do mere persuasions come under the head of moral force, in the case?

A. Two cases are to be distinguished. The first is where a girl and her lover, wishing to get married and yet fearing the anger and opposition of parents, relatives, or guardians, by a preconcerted plan, agreed upon beforehand by both, run away together in order to get married. Now this is evidently no abduction, but simply an *elopement* (*fuga*), and, of course, does not invalidate the marriage.

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[1] Feije, l. c. n. 164, 165.

[2] Cap. 6, de raptor. (v. 17).

[3] Feije, l. c. n. 171.

[4] Ib. n. 157.

376. The second case is where a man, wishing to marry a woman and finding that she is unwilling to marry him either then or later, begins to think of carrying her off, in order to induce her to marry him, and, for the purpose of inducing her to elope with him, uses flatteries, persuasions, and succeeds by means of them to induce her to consent to run away with him or to be abducted. In this case, the more probable opinion is that the abduction would annul the marriage.[1]

377. We say, moreover, *to another place where she is kept under the control of the abductor*. This is one of the essential features of the abduction. For the law presumes, and justly, that as long as a woman, weak and pliable as she is by nature, is under the control or influence, mediate or immediate, of the abductor, she is not free, and therefore does not consent freely to marriage. Hence the Council of Trent decrees: "Decernit S. Synodus, inter raptorem et raptam, quamdiu ipsa in potestate raptoris manserit, nullum posse consistere matrimonium."[2]

378. From this it will be seen that the impediment is not permanent. For as soon as the woman regains her entire freedom, and then wishes to marry the abductor, she can do so validly. But the law does not regard her as free until she has been totally separated from the abductor and put in a place where she is entirely free from his influence. Thus the Council of Trent says: "Quodsi rapta a raptore separata ac in loco tuto ac libero constituta, illum in virum habere consenserit, eam raptor in uxorem habeat."[3]

[1] Mansella, pp. 19, 20. [2] Sess. 24, cap. 6, de Ref. matr. [3] Ib.

379. We say finally, *for the purpose of contracting marriage.* The reason is that the law of the Church decreeing that the abductor and the woman abducted cannot validly marry each other until the woman has been completely freed from the control of the abductor, has for its object to safeguard the freedom of the *marital consent* of the woman. Hence, where the abduction does not contemplate marriage, it does not infringe upon the freedom of *marital* consent. Consequently, where the abduction is made for the purpose of committing fornication, it does not constitute the impediment. But where the abduction has taken place, the presumption of law, *in foro externo*, is always that it was made for the purpose of inducing the girl to consent to marry the abductor.[1] Consequently the burden of proving the contrary rests with the abductor.[2] Hence, if it remains doubtful whether the abduction was for the purpose of marriage or of fornication, the law of the Church holds that it was for the purpose of marriage, and annuls such a marriage.

380. Thus the Instr. Austr. § 173 says: "De rapta, quae cum raptore, dum in ejus potestate permaneret, matrimonium contraxit praesumendum est, quod matrimonii ineundi causa rapta sit Quod si contrarium plene probatum fuerit, consistit nihilominus praesumptio, eam violentia injusta ad consentiendum adactam esse."

381. The impediment of abduction, prescinding from the want of the consent of the woman, is *juris ecclesiastici*, and therefore does not bind unbaptized persons.[3] But the Church very seldom dispenses from it, so long as the woman remains under the abductor's control, because she

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[1] Feijẹ, l. c. n. 151,

[2] Card. Kutschker, l. c. vol. iii. pp. 463, 464.

[3] Hence if both the woman and her abductor are unbaptized, and the woman really consents to the marriage, which, however, is not presumed, the marriage is valid. But the impediment binds where one is baptized and the other not. (Gasparri, n. 562.)

presumes there is no consent to the marriage on the part of the girl, under these circumstances. She requires that the woman be first withdrawn from the abductor's control and be put in a place where she is perfectly free from the abductor's constraint. Nay, the Church detests abduction so greatly that she refuses, on pain of nullity, to grant a dispensation to the abductor from other diriment impediments, v.g., from consanguinity, until the woman has been removed from the abductor's control. Thus the Holy See, in the faculties granted to our bishops, says:[1] "Hae vero dispensationes matrimoniales, videlicet 6ª, 7ª, 8ª, 9ª, non concedantur, nisi cum clausula: *Dummodo mulier rapta non sit, vel si rapta fuerit in potestate raptoris non existat.*" If, therefore, a dispensation, v.g., from affinity, is executed in favor of the abductor and the woman abducted while the latter is under the control of the former, it is void and of no effect whatever.[2]

382. We have said that the Church dispenses very seldom from the impediment of abduction itself. In other words, she very rarely grants the dispensation allowing the abductor to marry the woman abducted by him *while she is under his control.* This is only proper. For, as a rule, it is easy for the abductor to put the woman in a free and safe place, after which he can marry her without a dispensation. However, even in the latter case, no parish priest should marry the parties, except by authority of the bishop, whose right and duty it is to declare whether the woman has really been withdrawn from the abductor's control.[3]

383. Yet sometimes very grave reasons and peculiar circumstances will occur, making it morally impossible or very difficult for the woman to be located in a place different from that where she is detained by the abductor. Under

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[1] Form. I. n. 10.

[2] Feije, l. c. n. 187.

[3] Ib. p. 115, note 1.

such circumstances, if the woman fully and freely consents to the marriage, the Church sometimes, owing to such very grave reasons, dispenses from the impediment, so that the marriage can be validly contracted even while the woman remains under the abductor's control.[1]

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[1] S. C. de P. F. 31 Januar. 1796; Gasparri, l. c. n. 560.

PART III.

JUDICIAL MARRIAGE PROCEDURE IN GENERAL.

384. In the present volume, as we have already said, we treat of that marriage process, or judicial procedure, only, in which the *disputed validity of a marriage already contracted* is to be settled or decided. Hence the process or trial of which we here speak is properly defined: The legitimate hearing and decision, by a competent ecclesiastical judge, of the validity of a marriage already contracted, as disputed between two parties called respectively plaintiff and defendant. From this definition it is apparent that, as in other trials, so also in the present one, the following things are required: 1° a competent judge; 2° a plaintiff and a defendant; 3° a full hearing of all the facts in the case. This full hearing is nothing else than the opportunity given to both parties to present to the judge whatever statements, arguments, and proofs they may have in favor of their respective claim or demand. 4° The hearing is to be legitimate; that is, it has to be conducted in the manner prescribed by the law of the Church. This legitimate hearing is called the process or trial, strictly speaking.

385. We shall now proceed to discuss these requisites in the following order. In the present or *third* part of the work we shall speak first of the court, that is, of the judge and of those persons who by law assist him in the trial. Next we shall treat of the parties, or the plaintiff and the defendant, and those who assist and represent them. Then we

shall treat of the means or proof made use of by those parties to convince the judge of the justice of their respective claims. Finally, in the next, or fourth, part of the book we shall speak of the trial itself, or of the manner and form in which the proofs are produced and the hearing is conducted.

CHAPTER I.

THE COURT—ITS PERSONNEL AND ORGANIZATION.

386. By an ecclesiastical court of justice (*curia pro causis contentiosis*), speaking in general, is meant the body of persons who exercise or concur in exercising contentious jurisdiction. Now, the persons who are at present required, also with us, to take part in exercising judicial power in reference to the disputed validity of a marriage already contracted are: 1° the judge; 2° the defender of the marriage bond; 3° the secretary.[1] These are the only persons who necessarily compose the court for the trial of marriages whose validity is in dispute.

ART I.

THE ORDINARY JUDGE.

387. The ecclesiastical judge is a person who is legitimately vested with public power to hear and decide litigious ecclesiastical causes.[2] We say, *legitimately vested.* Now a person receives judicial power in two ways: (*a*) by his very office or dignity; (*b*) by authorization, that is, by power of attorney or agent. The former is called an ordinary, the latter a delegated, judge. The former acts in his own name and by his own authority; the latter acts as judge, not in his

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[1] S. C. de P. F. Instr. *Causae Matr.* 1884, §§ 6, 7.

[2] Our Elements, vol. ii. n. 711.

own name or by his own authority, but in the name and as the agent of another judge vested with ordinary judicial power. The ordinary judge can, as a rule, authorize or delegate others to act for him in his stead, both as far as concerns the trial or hearing of the case, and the decision or sentence. The delegated judge cannot subdelegate or authorize others to act for him or in his stead, except in these three cases:[1] (*a*) where he is appointed as a *general* agent, that is, *ad universitatem causarum;* (*b*) where he is delegated by the Sovereign Pontiff;[2] (*c*) where he is appointed indeed as a *particular* agent, or as judge in a *particular* case only, but yet receives *expressly*, from his principal, power to subdelegate.

388. Q. Who is the ordinary judge in a diocese, also for matrimonial causes involving the validity of a marriage?

A. The bishop, or, *sede vacante*, the vicar-capitular (with us, administrator), is the sole ordinary judge, in the first instance, throughout the whole diocese, of all ecclesiastical causes, civil, criminal, and matrimonial. He alone, therefore, has power by virtue of his office to hear and decide judicially, or *in foro externo*, the contested validity of a marriage already contracted.[3] The bishop, being the ordinary judge, is free to sit personally in court in matrimonial causes, or to appoint others to do so in his stead. He is also at liberty to give these delegated judges power to hear and pronounce final sentence upon the cause, or only to hear or try it, and to reserve to himself the final decision or sentence.[4]

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[1] Soglia-Vecchiotti, vol. ii. p. 263.

[2] It is, however, to be observed that when the judge delegated *ad universitatem causarum*, or by the Pope, is (*a*) either commanded to attend to the case *personally*, (*b*) or when he has been delegated because of his personal skill or aptitude, then he cannot, as is apparent, subdelegate others to act for him or in his stead. (Cap. ult. de off. Jud. del.)

[3] Conc. Trid. sess. 24, cap. 20, de Ref.

[4] S. C. de P. F. Instr. *Causae Matr.* §§ 6, 24; Conc. Pl. Balt. III. n. 305.

389. Likewise the delegated judge, or, as he is called, the moderator or auditor, may be appointed by the bishop only for one or several matrimonial causes; or he may be authorized to hear or decide *all* such causes. In other words, the bishop may appoint a moderator or delegate judge, to act for him and in his stead, each time a case comes up for hearing and decision; or he may appoint one permanently and once for all, that is, for all cases that may arise. The same rule applies to the appointment of the secretary and defender of the marriage. The custom of appointing these officials once for all, or permanently, and for all cases, seems universal in this and other countries, and appears preferable to the custom of appointing them every time a cause comes up for trial. The reason is that officials permanently appointed cannot be as easily suspected, and therefore challenged, because of partiality or bias, as those who are appointed each time a case occurs. We shall now say a few words in regard to the qualifications and duties or powers of the moderator or delegated judge, in the causes under discussion.

ART. II.

THE MODERATOR OR DELEGATED JUDGE.

390. The moderator or delegated judge, whether appointed for one matrimonial cause only or for all, whether vested with power to hear and decide or only to hear the cause, that is, to collect the evidence, acts as a judge, though only in the name and in the stead of the bishop. Consequently (*a*) he should possess the qualifications, physical, intellectual, and moral, which both the office itself and the law of the Church require in a judge; (*b*) he should, moreover, have all the powers and duties of the ordinary judge, whose place he takes and in whose name he acts.

391. Q. What, then, are the chief qualifications required

in every judge, and consequently also in a judge delegated to hear and decide matrimonial causes?

A. Every judge is obliged to possess those qualifications, physical, intellectual, and moral, which enable him to exercise his office properly. Consequently he must not be *deaf*, or ignorant of the language of the country; otherwise he would not be able to hear or understand the statements made by the parties and their witnesses.

392. Again, the judge is the guardian or executor, not the arbitrary controller, of the law. Hence he should, both during the trial and in giving sentence, always proceed in conformity with the law of the Church.[1] Consequently he should be well versed in the law. In other words, a judge in marriage causes ought to be perfectly acquainted with the diriment impediments of marriage; with the admissibility and weight of proofs for or against the validity of a marriage; with the forms of procedure or of the trial; etc. Thus the Instr. *Causae Matrimoniales*, § 6, says: "Episcopus . . . aut alium probum et *expertum* virum delegabit." The general law of the Church likewise decrees: "Non sunt causae matrimonii tractandae per quoslibet, sed per judices discretos, *qui statuta canonum super his non ignorent*."[2]

393. Moreover, the moderator, besides possessing the above physical and intellectual capacities, should also have those *moral* qualities which make him *willing* to proceed and act *fairly*, *justly*, in accordance with the evidence, not according to his feelings, likes, or dislikes. Hence he should be a *vir probus*—a good and fair-minded man.

394. Finally, he should be an *ecclesiastic*.[3] For laics cannot exercise ecclesiastical jurisdiction.

395. Q. What are the duties of the moderator?

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[1] Thus the can. *judicet* 4, C. 3, Q. 7, says: "Bonus judex nihil ex arbitrio suo facit, sed juxta leges et jura pronuntiat." Cf. München, Eccl. Trials, vol. i. p. 72.

[2] Alexander III. cap. 1, de consang. (iv. 14); Card. Kutschker, vol. v. p. 486.

[3] Instr. cit. S. C. de P. F. § 6 says: "Episcopus . . . virum *e clero* delegabit."

A. The Third Plenary Council of Baltimore (n. 305) answers: "Auditoris seu moderatoris est tribunal convocare, partes et testes citare, ordinare investigationes, viros peritos ad eas instituendas deputare, edere decreta pro recta actorum compilatione; uno verbo omnia praestare tam in disquisitione praevia, quam in processu probatorio, quae judicis propria sunt."[1] The same Council[2] also says: "Auditori Episcopus si velit delegare potest etiam facultatem promulgandi sententiam, dummodo prius ab ipso, rationibus serio perpensis approbata fuerit."[3] In fact, the moderator takes the place and acts in the stead of the ordinary judge or of the bishop. He is, therefore, a judge and has all the powers and duties of a judge. Consequently he presides at the trial and also pronounces sentence, or merely conducts the trial, exclusive of the final decision, according as he is delegated for both or only for one.

396. Q. Can the moderator be challenged?

A. As in other causes, so also in matrimonial causes, the ecclesiastical judge, and consequently also the moderator who is a judge, though merely a delegated one, can be objected to or challenged, and that either (*a*) on the ground of *incompetence* or want of jurisdiction in the particular case,[4] v.g., when it is claimed that the husband has no domicile in the judge's diocese, or (*b*) because of *suspected unfairness* or want of impartiality.[5] This is expressly stated in the Instr. Austr., which says in art. 103: "Si conjuges vel nupturientes, qui in causis matrimonialibus citantur, competentiam tribunalis impugnare posse autumant, eidem intra decem post citationem intimatam dies exceptiones suas exponere debent. Quando reclamatio pro non fundata declaretur, liberum eis est, ad instantiam proxime superiorem appellationem dirigere." The same Instruction says again, in art.

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[1] Cf. Instr. S. C. de P. F. *Causae Matr.* § 9.

[2] Conc. Pl. Balt. III. n. 305.

[3] Cf. Instr. S. C. de P. F. cit. § 6, 24.

[4] Cf. Instr. cit. S. C. de P. F. § 2.

[5] Conc. Pl. Balt. III. n. 306.

100: "Consiliarius tribunalis matrimonialis (*moderator*, *auditor*), cujus ea est ad partes relatio, ut testis suspectus vel et respective inhabilis foret, ista in causa a functionibus suis exercendis abstinebit."

The mode of procedure to be followed in these challenges is the same in matrimonial as in other causes, and has been fully explained by us elsewhere.[1]

ART. III.

THE DEFENDER OF THE MARRIAGE.

397. The defender of the marriage (*defensor matrimonii*, *defensor S. Vinculi*) is a person necessarily appointed by the bishop to defend *ex officio* the validity of a marriage already contracted, when its annulment is demanded *in foro externo.* We say, *necessarily appointed;* for he must always take part in the trial or judicial proceedings involving the validity or invalidity of a marriage. We say, *of a marriage already contracted;* since his presence is not required for the validity of a marriage *about to be contracted.* He is appointed by the bishop, and may be suspended or removed from office by him for just cause. All this is clearly laid down by the S. C. de Prop. Fide,[2] as follows: "Praeterea ipse Ordinarius omnino tenetur deputare alium virum ecclesiasticum juris scientia et vitae probitate praeditum, qui matrimonii defensor existat. Eum vero suspendere vel removere, si justa causa adfuerit, et alium substituere iis qualitatibus ornatum Ordinario semper fas erit."

398. Q. What are the rights and duties of the marriage defender?

A. 1° It is his duty always to sustain and defend, both orally and in writing, the validity of the marriage.[3] Whenever, therefore, it is claimed *in foro externo* that a diriment impediment stands in the way of a marriage already contracted, and that in consequence it should be declared null, the official defender is obliged to defend its validity by showing, in every legal manner possible, but not by deceit, fraud, or bribery, that the asserted impediment on account of which the marriage is claimed to be invalid does not exist, or, if it did exist, has been removed, v.g., by dispensation or by the ratification of the consent on the part of the spouses. He is obliged to take an oath,[1] not only at the time of his appointment, but every time a matrimonial cause of nullity is to be tried, to discharge these duties faithfully.[2]

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[1] Our Elements of Eccl. Law, vol. ii. n. 1038.

[2] Instr. cit. § 7.

[3] Bened. XIV. Const. *Dei Miseratione*, § 6.

399. 2° His chief rights are as follows: He has a right to be present at all the judicial proceedings in the case, namely, at the presentation of the *libellus accusationis matrimonii;* at the hearing or deposition of the husband and wife; when the witnesses both for and against the marriage give their testimony; etc., etc.[3] To him the papers or documents presented by the parties are to be always communicated. The acts or minutes of the trial are always to be open to his inspection. Consequently he has to be cited by the moderator to all judicial proceedings and sessions of the court.[4] Otherwise the proceedings will be invalid. If he cannot be present at every session or judicial proceeding, the entire record or all the minutes of the proceedings from which he was absent are to be communicated to him.[5] His other privileges and duties will be explained throughout this treatise as occasion offers. He is entitled to a salary, to be fixed by the bishop, and to be paid either by the person who contends in favor of the validity of the marriage, if he is able to pay, or by the bishop himself out of the moneys received on occasion of dispensations,[6] etc.

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[1] Instr. S. C. de P. F. cit. § 10.

[2] Bened. XIV. Const. cit. § 7.

[3] Our Elements, vol. ii. n. 1455 sq.

[4] Card. Kutschker, vol. v. p. 494 sq.

[5] S. C. de P. F. Instr. cit. § 11.

[6] Bened. XIV. Const. cit. § 12.

400. Q. What should be the qualifications of this official defender?

A. 1° From his rights and duties, as explained, it is evident that he should be thoroughly versed in canon law, especially as it relates to marriage, its impediments, the judicial forms of procedure, the weight and admissibility of the evidence. Hence the Instr. of the Propaganda (§ 7) requires him to be *juris scientia praeditum.* 2° He should, of course, also be a man of unblemished character, who will not accept bribes from the parties. 3° With us, he must be an *ecclesiastic.*[1] According to the general law of the Church, a *layman* may be selected for the office, though an ecclesiastic is preferred.[2]

ART. IV.

THE SECRETARY.

401. In all judicial proceedings, and consequently also in marriage trials, where there is question of the validity of a marriage already contracted,[3] a secretary must be present whose duty it is to write down the minutes of the proceedings. Otherwise the proceedings are invalid.[4] The *Third Plenary Council of Baltimore* (n. 305) describes the duties of the secretary in a marriage process as follows: "Notarius (secretarius, cancellarius, actuarius) eo praesertim fine constituitur, ut totius processus protocollum excipiat, notando scilicet dicta et facta omnia judicialia, nominatim interrogationes examinandis factas eorumque responsiones; referendo in actis quidquid ad causam pertinet. Praeterea plura instrumenta in processu conficienda, ut fidem in posterum facere valeant, a notario signata sint oportet."[5] It is his duty not merely to write these minutes, but also to sign them.[6]

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[1] Instr. cit. § 7.

[2] Bened. XIV. Const. cit. § 5.

[3] Instr. S. C. C. 22 Aug. 1840, § *Cum itaque.*

[4] Instr. S. C. de P. F. 1884, § 6.

[5] Our Elements, vol. ii. n. 925.

[6] Schulte, Eheprocess, p. 50.

He also signs, together with the judge, all citations, admonitions, inhibitions, decrees, sentences, etc.[1] Finally, he should carefully file and arrange in proper order all the papers and documents of the cause and the trial.[2] Moreover, on all papers or documents presented by the parties he should write the date on which they were presented or exhibited to the court, or at least note the date in the minutes of the proceedings. Documents and papers, once they have been exhibited in court and filed by the secretary, should not be destroyed, or allowed to be taken from the file by anybody.[3]

402. Q. By whom is the secretary appointed and removed?

A. 1° He is appointed by the bishop. The appointment should be made in writing and recorded in the minutes of the trial or judicial proceedings. He should be sworn to discharge his duties faithfully. He need not be an ecclesiastic,[4] though with us it is customary always to appoint an ecclesiastic as secretary. He may be appointed, like the moderator and defender, for this or that marriage process only, or, as is customary with us, in general for all such trials.

403. 2° Where the secretary is appointed only for a particular case, his office lapses when the case is finished. Where he is appointed in general for all marriage causes, he can, it is true, be removed by the bishop, though it should be done only for just reasons. If he is suspected of unfairness or partiality, he may be challenged by the litigants, whose interest it is to have the records or minutes impartially drawn up.[5] He is entitled to a moderate salary, or to fees for the minutes and other papers written by him.

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[1] Card. Kutschker, l. c. vol. v. p. 488. [2] Ib. [3] Schulte, Ehepr. pp. 50, 51.

[4] De Instr. S. C. de P. F. says, § 6: "Episcopus alium virum designabit, qui cancellarii officio fungens."

[5] Schulte, Eheprocess, p. 31.

404. Q. What weight have the papers, records, or documents signed or attested by the secretary?

A. All papers, records, minutes, or documents pertaining to the cause or trial, which are subscribed or attested by the secretary, who has been sworn, constitute full proof of themselves.[1] In other words, full public belief is to be given to any paper, instrument, or record signed or attested by the secretary.[2] The reason is that all sworn public officials are presumed by law to be truthful and faithful in matters pertaining to their office, and therefore worthy of belief.[3] However, custom is also to be taken into consideration. Thus, in some places, full belief is given to papers or documents only when they are signed by the judge and the secretary.[4] The S. Congr. de Prop. Fide, Instr. *Causae Matrimoniales*, § 14, enacts that the minutes which give the sworn testimony or statements of the married couple and of the witnesses shall be signed by the parties making the statement, i.e., by the married couple and the witnesses, by the moderator, defender of the marriage, and lastly also by the secretary. Hence these minutes merit full belief only when they are signed by all these parties.

405. It should be observed here that the minutes or records both of the marriage process and of all other kinds of ecclesiastical trials should be read to and expressly approved by the parties, namely, by the plaintiff and the defendant, or by their advocates, and also by the witnesses. And the fact that they were thus read and approved should be carefully noted in the minutes.

406. From this it follows that while the sacred canons do not, except in regard to marriage trials involving the validity of a marriage already contracted, expressly prescribe that the minutes shall be signed also by the parties and the

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[1] Our Elements, vol. ii. n. 866, 867.

[2] Card. Kutschker, l. c. p. 489.

[3] Cap. 11, de probat.; cap. 16, de fide instr.; cap. 28, de test.

[4] Card. Kutschker, l. c. p. 489.

witnesses, yet it is always safest to have it done.[1] It should also be noted that if, at the time the minutes are read to the parties, corrections or changes are made by them, or if the judge himself finds that something has been omitted or stated erroneously, the correction should be made, not in the body of the minutes (the same holds of all documents), but separately, and that either in the margin or at the end, and underneath such corrections should be written the words "read and approved," and also the signature of the secretary and of the parties.[2]

CHAPTER II.

THE CONTENDING PARTIES AND THEIR ASSISTANTS.

407. BY the contending parties, or litigants, we mean the plaintiff and the defendant; by their assistants, their advocates and procurators or representatives. We shall briefly discuss their rights and duties.

ART. I.

THE PLAINTIFF, OR PARTY DEMANDING THE ANNULMENT OF THE MARRIAGE.

408. In the marriage process of nullity, as in every other ecclesiastical trial, there must be at least two persons who stand opposed to each other, namely, 1° the *petitioner* or *plaintiff* (*actor*, *petitor*), or the one who wishes to break the marriage, and who therefore demands that the judge shall declare it invalid; 2° the *defendant* or *respondent* (*reus*), that is, the person who opposes the demand and asks that the marriage be not declared invalid.

409. Who can be plaintiff in matrimonial causes of nullity, or who can demand the juridical annulment of a marriage

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[1] Schulte, Eheprocess, p. 51.

[2] Ib.

already contracted? We premise: Once a marriage has been contracted in an apparently valid manner, the only ground, of course, on which its annulment can be demanded is that a diriment impediment existed at the time of its solemnization. Now, as we have shown, there are two classes of annulling impediments or causes, namely, (*a*) those which are *juris privati*, and (*b*) those which are *juris publici.*

We now answer: The question "Who has the right to demand the annulment, in the case?" depends on the question: "To which of the above two classes does the impediment belong on account of which it is claimed that the marriage is invalid?"

§ 1. *Who can make the "accusatio matrimonii" when there is question of impediments "juris privati"?*

410. Q. Who can be plaintiffs, or demand the annulment of a marriage already contracted, in the case of alleged diriment impediments which are *juris privati?*

A. 1° If it is claimed that the marriage has been contracted with an impediment *juris privati*, such as error, fear, unfulfilled stipulations,[1] or any other want of consent, its annulment can be demanded (*accusatio matrimonii*) only by the married couple itself, and by no one else, as we have already shown. The reason is that if the couple is willing, either expressly or tacitly, to renew or ratify their consent given, v.g., under grave fear, substantial error, etc., and thus make the marriage valid, they can do so, and no one else has a right to interfere or to complain.

2° Nay, the annulment, in the case of impediments *juris privati*, can be demanded, not by either of the married couple, *but only by the spouse who has been injured*, namely, by the one who has been deceived, suffered from fear, or to whom the impotence of the other was unknown, who was under age (14 in men, 12 in women), or who was abducted, etc., and therefore not by the spouse who inflicted the fear, or is impotent, or caused the abduction, etc.[1]

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[1] To these may be added, for the present purpose, impotence, want of age, and abduction.

3° Nay, more, even the injured spouse, in the case, loses the right of demanding the annulment in all those cases where he or she, either expressly or tacitly, waives it. We say, *either expressly;* that is, where the injured spouse, after having come to the knowledge of the error, or after fear has ceased, or after arriving at full age (14 in men, 12 in women), or upon being restored to full liberty by the abductor, etc., expressly declares that he or she consents to the marriage, and therefore waives the right of asking for its annulment.[2]

411. We say also, *or tacitly;* namely, where the injured spouse, after the cessation of the injury,—v.g., where the error or fear has passed away, or liberty has been fully restored to the woman abducted,—knowingly and willingly (*a*) exercises the *copula*, or, (*b*) even without the *copula*, remains under the marital roof and continues to perform conjugal duties for six months. In these cases the law of the Church presumes that the injured spouse has, upon due knowledge, freely consented to renew his or her marital consent, and thus waived his or her right of asking for the annulment.

412. All this is expressly laid down in the *Instr. Austr.*, strongly recommended by the *Third Plenary Council of Baltimore.* This Instruction says, with regard to error and force: "Propter errorem et coactionem injustam ea tantum pars, quae in errore versata aut cui consensus coactione injusta extortus est, matrimonium accusare potest, *jure suo* excidit, quando, postquam errorem agnovisset, aut metus cessavisset, debitum conjugale voluntarie ac scienter praestiterit, vel etiam, quin circumstantia ista probari possit, conjugale vitae

[1] Card. Kutschker, vol. v. p. 706.
[2] Cap. 4, Qui Matr. acc. poss. (iv. 18).

consortium per sex menses voluntarie continuaverit."[1] Again: "Propter impedimentum raptus, raptor adversus matrimonium reclamare nequit. Rapta, quae raptui consensuit, suo matrimonii adcusandi jure in exordio libertatis plene recuperatae utatur; alias non amplius audiatur."[2]

413. We have just said, *knowingly and willingly.* By this we do not mean that the injured spouse is required to know that the injury done him or her, v.g., the grave fear, or substantial error, or the abduction, *constitutes a diriment impediment.* We mean simply that if the injured spouse, after coming to the knowledge of the true facts,—i.e., after discovering the error (*imped. erroris*), or after the fear (*imped. metus et vis*) or constraint has ceased,—either exercises the *copula*, or continues the cohabitation for six months in this state of freedom or knowledge, then, by presumption of law, such spouse ratifies his or her consent, and thus renders valid what was invalid at first, *even though he or she does not know that the facts,*[3]*—namely, the fear, error, abduction, etc.,—constitute a diriment impediment.*[4] This view is also expressly stated by the *Glossa*, in cap. 4, *Qui Matr. acc.*, as follows: "Quia ipso facto (copula) confirmatur quod non valebat. Item quod ab initio non tenuit ratihabitione sequenti valet."

§ 2. *Who can ask for the annulment in case of impediments "juris publici"?*

414. Q. Who can be plaintiffs, or who can demand the annulment of a marriage already contracted, when there is question of the impediments which are *juris publici?*

A. 1° Speaking in general, not merely the married couple, *but any person whatever* who has a knowledge of the impediment and is not presumed to act maliciously has a right to petition for the annulment of a marriage alleged to have been contracted with a diriment impediment *juris publici*. Thus we read in the Instr. Austr. § 115: "Matrimonium impugnandi jus, in quantum haud expresse ad conjuges restringatur, *competit Catholico cuivis*, exceptis iis, qui sua hac in re commoda quaerere suspecti sint, vel quamvis matrimonium contrahendum esse sciverint ac proclamationes debito modo institutae essent, impedimentum absque legitima excusatione silentio presserint." The reason is that, as we have already said, these annulling impediments have been instituted for the *general* or *public* good, and not merely for the welfare of the contracting parties. Hence it is of interest to all persons that marriages should not be contracted with such impediments; and if contracted with them, they should be annulled.

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[1] Instr. Austr. § 116. [2] Ib. § 120. [3] Card. Kutschker, vol. v. p. 716.
[4] Cap. 4, Qui Matr. acc. poss. (iv. 18).

415. 2° Speaking in particular, the very nature of the various impediments which are *juris publici* points out the propriety and utility, if not necessity, of giving the preference to certain persons, in the exercise of the right of demanding the annulment. In other words, those who know the facts best and have a special interest in the case are preferred to those who do not know the facts as well and who have no particular interest in the matter. This is evidently but just and proper.

416. According to this rule of preference, the right to demand the annulment, in the case, should be exercised in the following order, namely: *First*, by the married couple itself. However, if one of the married couple knew of the impediment at the time he or she contracted the marriage, such spouse, by that very fact, loses the right to demand the annulment, because *fraus sua nemini patrocinari debet*."[1] Such a spouse is not allowed to reap any benefit from his or her own blameworthy conduct. Yet such a spouse can indi-

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[1] Schulte, Eheproc. p. 81.

rectly cause the petition to be made. For, while he or she is personally incapacitated from presenting it, nevertheless he or she may tell it to others, and these others may make the demand, or cause the judge to have it made *ex officio.*[1] This spouse should be compelled to procure a dispensation, and thus to render the marriage valid; and if he or she refuses to do so, the judge may, and sometimes should, make the demand for the annulment *ex officio.* Where the impediment of a prior marriage existed, but has been subsequently removed, namely, by the death of the prior husband or wife, only that husband or wife of the second marriage, contracted while the first spouse still lived, who did not know that the first marriage still existed at the time the second was contracted, has a right to petition for the annulment of the second marriage.[2]

417. *Second.* In regard to persons other than the married couple, the preference in the exercise of the right of asking for the annulment is regulated and suggested by the nature itself of the different impediments which are *juris publici*, as follows: (*a*) When the validity of the marriage is impugned on account of the impediments of consanguinity, affinity, and public propriety, the right to demand the annulment, besides being exercisible by the married couple itself, belongs first to the parents, next to brothers and sisters and other relatives;[3] finally, in their default, to all others, especially neighbors, provided they are worthy of belief. Of course, the judge may also cause the petition to be made by the curia *ex officio.*

418. (*b*) When the validity of the marriage is impugned on account of other impediments, *juris publici*, v.g., clandestinity, solemn religious profession, the right to petition for its annulment, besides being vested in the married couple, belongs to all persons whatever who are worthy of belief,

[1] Arg. cap. 6, Qui Matr. acc. poss. (iv. 18).

[2] Schulte, l. c. p. 82.

[3] Cap. 3, Qui Matr. acc. poss.

whether they are relatives or not, especially when they are legitimately interested in the matter.[1] The judge may, of course, also have the demand made *ex officio.* In fact, in the case of all the impediments *publici juris*, the judge may, and sometimes should, proceed *ex officio.*

419. Whenever the Ordinary, or the judge delegated by him, proceeds *ex officio* against a marriage, he should not himself act as the petitioner, lest he would thus act at the same time as judge and plaintiff. He should therefore depute the fiscal procurator or some other competent person, lay or ecclesiastic, to draw up and present the formal petition for the annulment (*accusatio matrimonii*), and to collect and produce the proofs of the existence of the alleged impediment.[2]

420. What has been thus far said with regard to those who can make the formal and juridical demand for the annulment of a marriage, whether on account of an alleged impediment *juris privati* or *juris publici*, is thus summed up by the S. C. de Prop. Fide, in its Instr. *Causae Matrimoniales*, § 3: "Etenim in quibusdam impedimentis (videlicet *juris privati*) ipsi conjuges tantum uti accusatoris admittuntur, in aliis qui sunt iisdem sanguine propinqui, vel etiam quilibet de populo; ac tandem ex officio etiam inquisitio fieri potest, et quandoque debet."

421. Finally, from what has been said it follows that the formal and juridical demand for the annulment of a marriage already contracted cannot be received or admitted by the Ordinary or Moderator except when it is made or presented by the party (or his advocate) having the right to make it, as explained. Thus also the above Instr. of the S. C. de Prop. Fide says, § 3: "Quae (regularis et juridica accusatio) nunquam erit admittenda, nisi proficiscatur a persona vel personis, quae communi jure habiles ad accusandum habeantur."

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[1] Feije, l. c. n. 584.

[2] Card. Kutschker, l. c. vol. v. p. 756.

422. Q. Is the right to make the juridical petition for the annulment of the marriage forfeited by the lapse of time?

A. No. In other causes, v.g., in criminal causes, the action must be brought within a certain time (v.g., in criminal causes, generally within five years from the commission of the offence); otherwise it is prescribed, or, as it is said, barred by the statute of limitation. But this is not the case with matrimonial causes. They are never prescribed or barred by what may be called the ecclesiastical statute of limitation. Hence the petition for the annulment of a marriage can be made or renewed at any time, even after the marriage has been twice declared valid by the proper ecclesiastical courts.[1]

423. *Difference between the juridical petition for the annulment and the mere denunciation.*—The juridical petition for the annulment of a marriage already contracted (*accusatio matrimonii*) should be carefully distinguished from a mere *notice* or *information* (*denuntiatio matrimonii*) which some one may give the Ordinary as to the fact that a certain marriage is invalid because of such or such an impediment.[2] Such notice or information may be furnished by any person whatever, and without any formality. It has no other effect than to enable the judge to inquire further, and if he finds sufficient evidence, he may, in the case of impediments *juris publici*, order the fiscal procurator to make the *formal* petition for the annulment *ex officio*. But a juridical demand for the annulment can be made, as we have seen, only by certain persons; has to be made with certain formalities; and serves as the basis for the process or judicial procedure. This distinction is clearly indicated in the Instr. *Causae Matrimoniales* of the S. C. de Prop. Fide, § 3, where the

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[1] S. C. de P. F. Instr. cit. § 30; De Angelis, l. 4, t. 18, p. 280.

[2] Cf. Our Elements, vol. ii. n. 942 sq.

juridical petition is termed *regularis et juridica accusatio Matrimonii;* whereas the mere notice or information is called *simplex denuntiatio.*[1]

424. Finally, sometimes the right of a spouse to make the *accusatio* may not be sufficiently established from the facts or proofs submitted. Can the spouse, in this case, supply the proofs by his or her sworn statement? The Instr. Austr., § 170, answers thus: "In quantum ad probandam circumstantiam, a qua jus matrimonium accusandi dependet, jusjurandum conjugis matrimonium accusantis admitti possit, tribunal matrimoniale de casu in casum perpendat et decernat."

ART. II.

THE DEFENDANT, OR PARTY OPPOSING THE ANNULMENT.

425. *The defendant in causes of nullity arising from impediments "juris privati."*—In all these cases, namely, where the demand for the annulment is based on a diriment impediment *juris privati*, and where, consequently, one of the married couple is necessarily the plaintiff, the other spouse, as also the *defensor matrimonii ex officio*, becomes the defendant. We say, "as also the *defensor matrimonii ex officio.*"[2] For in all demands for the annulment of a marriage there is question not only of the interests or rights of the spouses, but also of the rights and sanctity of the marriage itself. Now the official defender is the representative of the marriage, and of its rights—such as its indissolubility. Hence he always becomes a necessary co-defendant in all processes of nullity. He must, in consequence, always adhere to the spouse or party who is the defendant, and that whether the annulment is asked because of an alleged impediment *juris privati* or *juris publici.*

426. *The legitimate defendant in causes of nullity arising from alleged impediments "juris publici."*—We have seen who

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[1] Cf. Instr. Austr. §§ 128, 129, 130, 132.

[2] Schulte, Eheproc. pp. 72, 73.

are the legitimate plaintiffs in these causes. Let us now see who are the defendants. Where only one of the married couple can and does make the formal petition for the annulment, the other spouse is the defendant. Where both of the married couple can and do make the petition, the official defender is the defendant. Where this petition is made not by the married couple, but by third parties, v.g., by parents, relatives, or by the Curia *ex officio*, then sometimes one, sometimes both spouses are the defendants.[1] The official defender of the marriage bond must always adhere to or take sides and co-operate with the actual defendants. Nay, this official defender must act as defendant, and therefore defend the validity of the contested marriage,[2] even where the spouse or spouses who are the defendants are absent from the proceedings or trial, either because they are in collusion with the plaintiff, in order to break the marriage, or because they are indifferent as to the result, or because they are in parts unknown and have not received the citation for trial.

ART. III.

POSITION OR RIGHTS OF THE PLAINTIFF AND THE DEFENDANT.

427. Q. What are, in general, the respective rights of the plaintiff and the defendant in matrimonial causes?

A. 1° As in other causes, so also in matrimonial causes involving the validity of a marriage already contracted, both the contending parties—that is, the plaintiff and the defendant—have an *equal* right to be heard by the judge. In other words, each should be given the same full and free opportunity as the other of presenting his case to the judge, and of being thus fully and fairly heard. Consequently both parties stand on a perfect footing of equality before the judge,[1] and no preference should be given to either of them.[2]

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[1] Card. Kutschker, l. c. vol. v. pp. 838, 839.

[2] Schulte, l. c. pp. 73, 83.

428. 2° It is a peculiar feature of matrimonial causes involving the validity of marriages already contracted that—also with us—the plaintiff is not allowed to be present at the examination of the spouse who is the defendant; neither is the spouse who is the defendant permitted to be present at the examination of the plaintiff. The reason is that the law easily suspects that a husband and wife, having become tired of their marriage, may enter into collusion with each other in order to break it. It is to frustrate the success of any such collusion that the above rule of exclusion has been established and applied by the Holy See also to this country.[3]

429. 3° From this rule of exclusion, however, the *defensor matrimonii* is completely excepted. He has the right and duty of being present at all the sessions and proceedings of the court, and consequently also at the examination of both spouses and of the witnesses on both sides.[4]

430. 4° Finally, the plaintiff and the defendant have the full right, also in the present causes, to *put questions to each other*, through the judge, in regard to the facts in the case, and for the purpose of bringing out these facts fully and clearly.[5] These questions or interrogatories are called *positiones* or *articuli*.[6] This right is fully retained in our matrimonial trials of nullity by the Instr. S. C. de P. F. *Causae Matr.* § 18, as follows: "Secundo loco (inter examinandos) veniunt conjuges ipsi, qui semper et seorsum audiri debent, ut unusquisque sua jura tueri, et rationes, deductiones, ac facta allata aut rejicere, aut explicare queat. *Quaelibet pars examini subjecta poterit* vel illico post examen, vel etiam deinceps,

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[1] Cap. 2, de mut. pet. (ii. 4) . . . "quum actoris et rei *eadem sit conditio.*"

[2] Schulte, Eheproc. p. 83.

[3] Instr. S. C. de P. F. cit. §§ 18, 21.

[4] Instr. S. C. cit. §§ 10, 21.

[5] Schulte, l. c. p. 86 sq.

[6] Our Elements, vol. ii. n. 1070 sq.

antequam processus claudatur, *proponere sit velit, articulos, super quibus alter conjux sit examinandus; et quatenus etiam ab hoc articuli proponantur*, erit iterum citandus conjux qui primus fuerat examinatus, ut super articulis ab altero propositis audiatur."

ART. IV.

ADVOCATES.

431. Advocates in ecclesiastical causes are persons learned in the law of the Church, who are authorized by public authority, namely, by the Ordinary, to assist the contending parties in judicial proceedings of ecclesiastical courts.[1] In all causes of a contentious nature the assistance of an advocate is useful, and very often even necessary, and is therefore always allowed by the law of the Church. This holds good even in causes where the contending parties are ecclesiastics, and therefore supposed to know the law of the Church in regard to judicial proceedings. For, being personally and directly interested parties, they lack that cool judgment which is so necessary for the proper presentation of a case, and therefore need an advocate to help them.

432. This reasoning evidently applies with much greater force to matrimonial causes involving the validity or nullity of a marriage already contracted. For the litigants—the husband and wife—being lay people, are, especially in this country, as a rule, wholly without the requisite knowledge of the law of the Church on such matters, to be able to conduct their case in person. Then, again, these causes are generally very complex. Hence it is very important that the litigants—the plaintiff and defendant spouses—should secure the assistance of able advocates from the very beginning of the case. It is the duty of the advocates for the

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[1] Schulte, l. c. p. 98; Our Elements, vol. ii. n. 767.

plaintiff and defendant respectively to draw up the juridical petition for the annulment of the marriage (*accusatio matrimonii*), and the answer thereto; to assist their clients, by advice and deed, during the entire process; to make the written and oral summing up, etc.

433. Accordingly the Instr. S. C. de P. F.[1] says: "Facta iisdem (partibus) facultate adhibendi eos defensores quos maluerint; imo praemonendae erunt de hoc jure." The *Third Plenary Council of Baltimore*, n. 307, enacts likewise: "Advocatos seu defensores conjugibus adducere fas est, ut sua jura tueantur, eorumque consilio uti." The Instr. Austr. § 143, also decrees: "Tam in praevia inquisitione, quam ad processum probatorium conjuges personaliter se sistere debent. *Conceditur quidem ut advocatos secum adducant, et antequam declarationem exhibeant eorum consilium expetant.*" Nay, where a party, owing to poverty or other cause, is unable to procure an advocate, the ecclesiastical judge is bound to appoint one for him.[2]

434. According to the general law of the Church, Catholic[3] laymen can be advocates in matrimonial as well as in other ecclesiastical causes. Neither the S. C. de P. F.[4] nor the *Third Plenary Council of Baltimore* (n. 307) has excluded them from acting as advocates in matrimonial causes, with us. Of course, ecclesiastics may, and usually do, act as advocates for the parties, in these causes, also in this country.

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[1] *Causae Matr.* § 23.

[2] Honor. III. cap. 1 de off. jud. del. (i. 32).

[3] Cap. 13, § 5, de haeret. (v. 7); Schulte, l. c. pp. 98, 99.

[4] Instr. cit. § 23.

CHAPTER III.

JUDICIAL PROOFS IN MATRIMONIAL CAUSES OF NULLITY.

435. The presumption of the law of the Church is always in favor of the validity of a marriage, once it has been contracted in due form, that is, in an apparently valid manner. In other words, the law takes it for granted that the marriage thus contracted is valid, until the contrary is fully proved. Hence its invalidity must be established by *full canonical proofs.* It is evident, therefore, that a clear and full knowledge of these proofs is of great importance. In fact, the whole and sole aim of a trial or process involving the validity of a marriage already contracted is to *prove* its validity or invalidity. We shall therefore briefly speak of the features which are common to all these proofs; next, of each proof in particular.

SECTION I.

NATURE, VARIOUS KINDS, WEIGHT, ETC., OF MATRIMONIAL PROOFS.

ART. I.

TRUE IDEA OF CANONICAL PROOFS.

436. Q. What is meant by a canonical proof in matrimonial causes of nullity.

A. It is any legitimate means or argument by which the validity or invalidity of a marriage already contracted, as disputed between the plaintiff and the defendant, is demonstrated or made certain to the ecclesiastical judge. We say *means or argument;* these terms are taken in their broadest sense, and mean witnesses, documents, etc. We say also *legitimate;* the proof is to be such as the law of the Church prescribes. Now, as we shall see later on, matrimonial proofs differ in some material respects from proofs in other ecclesiastical causes. We say, moreover, *to the ecclesiastical judge;* for we speak of *judicial* proofs, that is, of proofs produced before a judge, during a trial or judicial process. We say, finally, *of a marriage already contracted;* since we speak, in this present volume, not of marriages about to be contracted, nor of separation from *mensa et thoro*, nor of betrothals, but only of marriages already contracted.

ART. II.

WEIGHT OF PROOFS.

437. The aim of proofs is to remove doubt and uncertainty, and consequently to give the judge certainty as to a disputed fact—namely, in our case, as to the validity or invalidity of the marriage. By certainty is not meant an absolute certainty, but merely a moral certainty, or one that excludes any reasonable doubt to the contrary. Now it is plain that not all proofs have the same force or convincing weight. Some are so strong and convincing as to give the judge a full moral certainty of the disputed fact or validity of the marriage. They are called full, perfect, complete proofs (*probatio plena*). Others are not so conclusive, and merely give the judge a probability, not a moral certainty. They are consequently termed imperfect, incomplete, half proofs (*probatio semiplena*.)

438. Q. What are, by the law of the Church, the proofs which give the judge a full moral certainty of the invalidity of a marriage already contracted?

A. They are: 1° The testimony of two unexceptionable witnesses on the same point; 2° A public instrument or other authentic writing having the force of a public instrument; 3° The presumption which is called *juris et de jure;*

4° Notoriety of fact; 5° The inspection and testimony of experts, namely, of physicians and surgeons. Of each of these kinds of proof we shall speak in detail further on. All the other proofs are imperfect ones.

439. Q. What are the imperfect proofs, or those which give merely a probability, not a moral certainty, of the validity or invalidity of the marriage?

A. They are chiefly: 1° The admission or confession of the married couple; 2° The testimony of one witness, or of several witnesses, testifying to differents points, or of two witnesses who testify indeed to the same point, but who are not above all suspicion; 3° Writings of a private character; 4° Probable presumptions, or presumptions which are not *juris et de jure;* 5° Common report or public fame, when canonically established.

440. From the above it will be seen that there is considerable difference between proofs in matrimonial causes and those in other ecclesiastical causes, civil or criminal. Thus in the latter causes the oath taken by the litigants, and the admission or confession made by them against themselves, constitute full proof. But in matrimonial causes neither the oath nor the admission of the married couple constitutes full proof, but, at most, an imperfect proof or no proof at all.

441. This shows also that a marked difference exists between proofs sufficient *in foro interno* and proofs required *in foro externo. In foro conscientiae* no other proof is required beside the statement or admission of the married couple, unless the contrary is manifest. For the law of the Church is that in the forum of conscience, *poenitenti tam pro se quam contra se credendum est*, also with regard to matrimonial causes of nullity.[1] But in the external forum of the Church the mere assertions or statements of the married couple are

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[1] Leur. For. Eccl. l. 4, t. 19, q. 286.

not considered proofs as *against* the validity of the marriage, and that no matter whether the alleged diriment impediment is *juris publici* or *juris privati.*

ART. III.

MANNER OF PRODUCING PROOFS.

442. The manner of producing proofs in matrimonial causes of nullity is the same, speaking in general, as in other ecclesiastical causes, civil or criminal.[1] Accordingly, the following rules are to be observed in the presentation of the proofs in question: 1° They are to be produced before the judge himself, and in the presence of the opponent,[2] and of a secretary,[3] who notes or writes them down, in the minutes of the proceedings.[4] We say, *before the judge himself.* For it is the aim of proofs to convince the judge, and thus to enable him to give his decision in accordance with the true facts in the case.

443. We say also, *in the presence of the opponent.* This refers especially to the testimony of witnesses, and is done either really or constructively. In other words, witnesses may be examined in two ways: one, in the actual presence of the opponent or his advocate; the other, in his constructive, not real, presence. The first takes place in this manner: The party against whom the witnesses are produced, or his advocate, is cited and allowed to be present, not only when they take the oath prior to their testifying, but also at the examination itself, and to cross-examine them. This is called the *personal confrontation*, because the opponent and the witness confront each other in person.[5]

444. The second mode takes place thus: The opponent, that is, the party against whom the witnesses are produced,

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[1] Our Elements, vol. ii. n. 818, 819, 1485 sq.

[2] Cap. 2 de test. (ii. 20).

[3] Cap. 11, de prob.

[4] De Angelis, l. 2, t. 19, p. 36.

[5] Our New Procedure, n. 355, 356.

is cited and allowed to see the witnesses take the oath before they are examined, and also to except against their persons or admissibility. But he is not permitted to be present at the examination itself. However, after the examination is over, the entire testimony, together with the names of the witnesses, must be communicated to him. Hence this mode is termed *verbal confrontation*, because the party is confronted only with the words (*verba*), or testimony, of the witnesses.[1]

445. The general law of the Church, as in force at present, also in this country, under the Instr. *Causae Matr.*, allows of either of these modes, namely, of the personal or of the verbal confrontation, in matrimonial causes of nullity.[2] For the Instr. *Causae Matrimoniales*, it is true, enacts (§§ 18, 21) that the two spouses—whether one of them is the plaintiff and the other the defendant, or whether a third party is the plaintiff and both spouses are defendants—shall always be heard separately, to prevent collusion. It decrees also (§ 13) that witnesses shall be examined separately (*seorsum*), that is, *apart from other witnesses.* But nowhere does it say that the witnesses are to be examined apart from the opponent or his advocate. In fact, the Instruction is completely silent on this matter, and consequently admits both of the verbal and personal confrontation, as already explained.

446. Nor does this conclusion seem opposed to §§ 21, 22, of the above Instruction, which forbids the records or acts to be published, even to the spouses or their advocates, until after the close of the trial. For there is manifestly a vast difference between the full, connected, and unreserved publication mentioned in the above articles 21, 22, and the partial, disconnected, and imperfect one which results from the opponent's or his advocate's being present at the examination of the witnesses.

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[1] Our Elements, vol. ii. n. 837, 838, 839, 1117, 1118, 1122, sq.

[2] Our New Procedure, n. 357.

447. Neither is the inference in question opposed by the fact that the spouses are always to be heard separately. For their depositions are not regarded as proof, but merely as a joining of issue (*litis, matrimonii contestatio*), or a statement of the case by the principals, which is to be proved by third parties, that is, by witnesses, or also by instruments, etc.

448. We have said that the general law of the Church admits of either the personal or the verbal confrontation, also in matrimonial causes of nullity. But it should also be borne in mind, and it is conceded by all canonists, that when there is question of the details of the formalities of trials, the customs or ecclesiastical legislation of particular countries should be followed, unless they are clearly opposed to the general law of the Church. Hence such custom or legislation may establish, in a particular country, the verbal to the exclusion of the personal confrontation.

449. This is the case, for instance, in Austria. Thus the Instruction on Marriage Causes for the Empire of Austria says under art. 163: "Ad jusjurandum a testibus praestandum conjuges ac, si matrimonium a tertio quodam accusetur, iste quoque, vocandi sunt. Attamen vocatorum absentia, quin jusjurandum excipiatur, impedire nequit." Again under art. 164: "Examen testium partibus remotis et singillatim instituendum est ac, antequam omnino terminatum sit, testium depositiones haud publicentur." And again under art. 161: "Interrogationes testibus proponendas, commissarius concipit, habita ratione punctorum interrogatoriorum, quae a partibus forsan exhibita sunt."

450. With us, custom and usage favor the personal confrontation, except where grave inconvenience would result from it. We say, *except where grave*, etc.; for there will be circumstances, especially in matrimonial causes of nullity, where the personal confrontation may be unbecoming, nay, even hurtful. Consequently it must be left to the con-

scientious discretion of the auditor or judge to permit the personal or merely the verbal confrontation. He may also, even where he allows of the personal confrontation, permit only the advocate of the party to be present, not the principal himself. For it is plain that not unfrequently the advocate, who is a disinterested party, may be allowed to be present, when the principal, who is directly interested, ought to be excluded.[1]

451. 2° The proofs should be *clear* and *to the point.* We say *clear.* Hence if they are *equivocal*, that is, if they can be applied to one thing as well as to another, they are of no account, and should be rejected.[2] We say, also, *to the point.* In other words, they should bear on the *matter at issue*, that is, in matrimonial causes of nullity, upon the alleged diriment impediment on account of which the annulment of the marriage is asked.

452. 3° The proofs should, as a rule, be presented to the judge after the *litis contestatio*, that is, in our case, after the plaintiff and the defendant—namely, the petitioner for the annulment of the marriage and the husband and the wife—have given their respective sworn statements, as provided in arts. 17, 18, of the Instruction of the S. C. de P. F., and have thus joined and clearly stated the issue. We say, *as a rule;* for in matrimonial causes instruments are to be received at all times;[3] even witnesses may be juridically examined prior to the *litis contestatio* when it is feared that old age, sickness, etc., may make it impossible to get their testimony afterwards.[4]

453. 4° All proofs should, as a rule, be produced, also in matrimonial causes, before the entire acts or minutes of the process are communicated to both parties, according to art. 22 of the Instr. S. C. de P. F.

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[1] Our Compend. Juris Can. n. 1086, et ib. nota 3.

[2] De Angelis, l. c.

[3] Instr. S. C. de P. F. cit. § 18.

[4] Our New Procedure, n. 254 sq.; De Angelis, l. c. p. 38.

ART. IV.

THE OBJECT OF PROOFS.

454. All proofs in matrimonial causes regarding the validity of a marriage already contracted have for their object to prove or disprove its invalidity or validity. Now the nullity or invalidity of a marriage can proceed only from one fact, namely, from the fact that an annulling impediment existed at the time of its solemnization. Hence in order to prove the nullity of a marriage contracted, it is necessary to prove that a specified diriment impediment, v.g., consanguinity within the fourth degree, stood in its way at the time of its celebration. Of course, the proofs must be confined to the particular impediment alleged as the cause of the claimed nullity. For it were useless to produce proofs bearing on some other impediment.

455. We have said, *at the time of its solemnization.* For if a diriment impediment *supervenes* a marriage already contracted it does not dissolve or annul the marriage.[1] Thus where the impediment of affinity is contracted by a couple after their marriage,[2] that is, where one of the married couple has had carnal intercourse with a blood-relative of the other, within the fourth degree ;[3] or where the impediment of *disparitas cultus* is contracted by a couple after their marriage, namely, where of two unbaptized spouses one becomes baptized and the other remains unbaptized, such affinity or *cultus disparitas* does not affect the validity of the marriage, previously contracted.

456. The reason is plain. For where the impediment did not exist at the time the marriage was contracted, the latter was validly contracted. Now once a marriage has

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[1] Feije, de Imped. n. 84. [2] Ib. n. 382. [3] Cap. 1 de eo qui cogn. (iv. 13).

been validly contracted it remains valid forever, and is not affected by any impediment which is contracted afterwards.

457. Yet there are three cases in which a marriage validly contracted is dissolved, to wit: 1° Where a marriage, which is not yet consummated, is dissolved by dispensation *a matrimonio rato et non consummato*, on the part of the Supreme Pontiff; 2° Where after a marriage has been validly contracted, but not yet consummated, one of the spouses enters a religious order, and makes solemn vows; 3° Where of two infidel or unbaptized spouses one becomes converted to the faith and is baptized, and contracts under certain circumstances another marriage with a Christian.[1]

ART. V.

UPON WHOM LIES THE "ONUS PROBANDI."

458. The rule is that the *onus probandi*, or the burden of proof in judicial proceedings, lies upon him who asserts something prejudicial or injurious to another person, unless the person so asserting has the presumption of law in favor of his assertion.[2] Now, generally speaking, the plaintiff is the one who asserts something detrimental to the defendant.[3] Consequently, the burden of proof falls usually upon the plaintiff, not upon the defendant. Hence when the defendant denies the plaintiff's assertions or claims, the latter is bound to prove them; if he fails to do so, the defendant wins, even though he has not disproved anything. This rule applies fully also to matrimonial causes of nullity. Therefore, in these causes the burden of proof falls upon the one who petitions for the invalidity of the marriage

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[1] Konings, n. 1563.

[2] L. 2 ff. de prob.; l. 1, C. de prob.

[3] De Angelis, l. 2, t. 19, p. 39.

contracted, and that whether he be one of the married couple, or a third private party, or the fiscal procurator. For such petitioner, by his petition, asserts, to the detriment of the marriage and the defendant spouse, that it is invalid, and so far from having the presumption of law in favor of his assertion, the very opposite is the case. For, as we have seen, the presumption of law (*praesumptio juris*) is always in favor of the validity of a marriage which has been contracted in an apparently valid manner.[1]

459. The effect of this presumption of law is that the ecclesiastical judge cannot declare the marriage invalid until the petitioner or accuser of the marriage has proved by full canonical proofs, excluding any reasonable doubt to the contrary, v.g., by two unexceptionable witnesses,[2] that a diriment impediment existed at the time of its celebration, and that in consequence it is invalid.[3] This presumption militates not only in favor of the validity of the marriages of baptized persons, but also of unbaptized persons.[4] If any reasonable doubt remains as to the existence of the impediment, and consequently as to the validity of the marriage, the marriage cannot be pronounced invalid. For "tolerabilius est, aliquos contra statuta hominum dimittere copulatos, quam conjunctos legitime contra statuta Domini separare."[5]

460. When we come to apply this principle to a *twofold or double marriage*, namely, where a person already married contracts a second marriage while his or her first spouse is still alive, *the presumption is in favor of the validity of the first*, not of the second, marriage.

461. However, the rule that the presumption militates in favor of the validity of the contracted marriage has these

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[1] Cap. 22 de test.; cap. 26 de sponsal.; cap. 39 de appell.; cap. 3 qui matr. acc. poss.

[2] Instr. Austr. § 147.

[3] Card. Kutschker, l. c. vol. v. pp. 831, 832.

[4] Cap. 8 de Divort.

[5] Cap. 47 de test. (ii. 20).

exceptions: 1° Where a marriage has been contracted by persons under the age of puberty (12 for girls, 14 for boys). For in this case the law of the Church presumes that the parties do not possess the requisite mental and physical development required for marriage; 2° Where a woman is abducted, that is, forcibly carried off and detained, to induce her to marry a certain man. For until the person abducted is restored to complete liberty, the law of the Church presumes she was not free, and therefore that the marriage contracted is invalid. 3° When parties in places where the Tridentine decree *Tametsi* does not bind contract marriage clandestinely, that is, by their sole consent, and without the priest or witnesses, the legal presumption, *in foro externo*, is, as a rule, against the existence of the marriage.[1] In other words, *in foro externo*, the law of the Church presumes, as a rule, that there was no marriage in the case, until it is positively proved that the marriage really took place.

462. We have just said, *as a rule*. The exception is where the clandestine marriage is in possession. In other words, where in the case of a supposed or claimed clandestine marriage the husband and wife are in good faith, that is, believe they are living together in lawful wedlock, and where other people are under the same impression, so that there is no scandal,[2] the presumption of law is not against but for the existence of the marriage. Once the existence of a clandestine marriage is proved or presumed, its validity is *eo ipso* presumed, and that both *in foro interno* and *externo*, according to the axiom:[3] *In dubio* standum est pro valore matrimonii.[4]

463. Hence, except in the three cases just mentioned, the *onus probandi* lies upon the plaintiff or the person asserting

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[1] Card. Kutschker, l. c. vol. v. p. 833.

[2] S. C. S. O. 18 Dec. 1872.

[3] Cap. 47 de test.; cap. ult. de cond. app.

[4] Gasparri, n. 217.

the invalidity of a marriage contracted. It should also be noted that the presumption which militates in these three cases against the validity or existence of the marriage contracted is not sufficient to establish its invalidity or non-existence. It simply takes the invalidity or non-existence for granted till the contrary is proven.[1]

464. *When the "onus probandi" may fall upon the defendant, also in matrimonial causes of nullity.*—We have thus far seen that the burden of proof usually rests upon the plaintiff, also in matrimonial causes of nullity. We say, *usually;* for there are several cases where the burden of proof falls upon the defendant, not upon the plaintiff. These cases are chiefly:

1° Where the presumption of law is on the side of the plaintiff, and against the defendant, as we have seen is the case in the marriage of persons under the age of puberty. In fact, the rule is that the *onus probandi* always devolves upon the person—whether he be plaintiff or defendant, whether he assert or deny—against whose claim or statement there is a presumption of law. For the effect of a presumption of law is to throw the *onus probandi* upon the person against whom it militates.

465. 2° Where the defendant, being confident of the issue, voluntarily takes upon himself the burden of proof.[2]

466. 3° Where the defendant makes an exception by which he affirms something, since *reus in exceptione fit actor.*[3] Thus, as we have seen, in speaking of a twofold marriage, the spouse who is the defendant of the second marriage may set up three defences or exceptions: (*a*) that the first marriage is invalid by reason of a diriment impediment; (*b*) that the spouse of the first marriage has died *since* the second was contracted; (*c*) that the first spouse died *before* the

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[1] Card. Kutschker, l. c. pp. 832, 833.

[2] L. 14 ff. de prob.; De Angelis, l. c. p. 41.

[3] L. 1 ff. de Except.

second marriage was celebrated. In all these cases the defendant spouse becomes the plaintiff with regard to the exception, and is bound to prove what he or she asserts.

ART. VI.

PROOF OF A NEGATIVE.

467. Apart from the above cases, where the *onus probandi* devolves upon the defendant, it happens not unfrequently, also in matrimonial causes of nullity, that one of the litigants —plaintiff or defendant—will deny facts bearing directly or indirectly on the issue, that is, on the alleged diriment impediment. Is he sometimes bound to prove such a denial; and when can a denial be proved? It is necessary to distinguish between three kinds of denials: namely, of *fact*, of *law*, of *quality*.

468. *A negative of quality* is one by which it is denied that a certain person possesses *certain qualities.* If these qualities are such as are naturally and commonly possessed by all men, v.g., hearing, eyesight, a sane mind, the burden of proof lies upon the one who denies them. For the law justly presumes that they are possessed by everybody. On the same principle, the law presumes everybody innocent. But if the qualities in question are such as are possessed only exceptionally, v.g., the quality of doctor in law, or in philosophy, etc., then the burden of proof lies upon the one asserting them, when there is question of appointing him to an office requiring them, and upon the one denying them, when there is question of removing some person from an office for which they are prescribed.[1]

469. *A negative of law* is one by which it is denied that a certain thing or act *can be or has been lawfully and validly done*, v.g., if a person denies that a certain election has taken place

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[1] De Angelis, l. 2, t. 19, p. 41.

in a valid manner. Now, when the act whose validity or legality is denied belongs to the class of things or acts which are in general allowed by law, the denial must be proved by the person denying. The reason is that the presumption of law in the case is that the thing or act denied can be or has been done lawfully or validly. Besides, such negatives imply an affirmative, namely, that the act has been done unjustly or invalidly.[1] But when the thing or act whose legality or validity is denied belongs to the class of things or acts which are in general forbidden by law, v.g., murder, then the *onus probandi* devolves not upon the person denying, but upon the one affirming its legality or validity. Because in this case the law presumes that the act was not and could not be done lawfully or validly.[2]

470. *A negative of fact* is one where it is denied that something has been done or taken place, v.g., "I deny that I killed Titius." There are three kinds of denials of facts: namely, first, a denial, *pure, simple, and unqualified* as to time, place, or other circumstances; v.g., if a person says he did not get drunk, or he was never cited, or he did not resign his ecclesiastical office. Such a denial cannot be proved, either directly or indirectly. For what does not exist cannot be proved. Now an act or fact which is denied absolutely is supposed to have no existence.[3]

471. Second, a *qualified denial*, that is, a denial qualified as to time, place, and other circumstances; for instance, if a person denies that he contracted marriage with Bertha, at such an hour or place, etc. This kind of denial may be proved indirectly by the person denying, namely, if he proves that at the time or place mentioned he was in a different place altogether.[4] We say *may;* for it need not necessarily be proved by him, unless he makes it the ground of an action,

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[1] Reiff. l. 2, t. 16, n. 49.

[2] Schmalzg. l. 2, t. 19, n. 36 sq.

[3] L. 23 C. de prob.; cap. 23 de elect.

[4] Cap. 35 de test.

since in this latter case the rule applies that every one is bound to prove that which is the basis of his demand or action.[1]

472. Third, *a pregnant negative*, that is, a denial which virtually and impliedly contains an *affirmative assertion*, v.g., if a person denies that he resigned his ecclesiastical office of his own free will. It is clear that this denial is equivalent to or implies the affirmation that he resigned through constraint. This kind of denial, therefore, can and should be proved by the one denying.[2] Hence, in order to avoid the burden of proof, a defendant will do well not to make a pregnant denial, but to answer disjunctively, v.g., thus: I did not resign; and if I did, it was through constraint, fear, or error. This disjunctive answer or denial contains, first, an absolute or pure and simple denial; then a pregnant denial. The effect is that the *onus probandi* with regard to the absolute denial falls upon the plaintiff, or the one affirming what is denied. He must first prove that which is absolutely denied, and only after he has proved it is the defendant required to prove his pregnant denial, or the second part of his disjunctive answer or denial.[3]

SECTION II.

PROOFS IN MATRIMONIAL CAUSES IN PARTICULAR.

473. We have in the preceding section discussed the proofs which are made use of in matrimonial causes, under their general aspect, and we have shown what requisites or qualities are common to them all. We shall now briefly treat separately of the different kinds of proofs, or means of establishing the validity or invalidity of a marriage contracted.

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[1] Schmalzg. l. 2, t. 19, n. 37, 38.

[2] Cap. 5 de renunt.

[3] Card. Kutschker, l. c. vol. v. p. 836.

ART. I.

THE CONFESSION.

474. By the confession is here understood any statement or admission by a party or litigant *against* himself or his claims, and *for* or in favor of his opponent.[1] We say *against himself*, etc.; in other words, the admission must be against the person making it, not for him. Otherwise a person could easily manufacture all the evidence he pleased, by simply asserting his claim. In fact, what a person says *against himself*, and against his interest and claim, being injurious to him, cannot, as a rule, proceed from interested motives, and is therefore presumed to be true. Whereas, what a person says in his own favor is naturally prompted by selfish motives, and is therefore presumed to be false, or is at least strongly suspected of falsehood.

475. The confession or admission is made (*a*) either before the judge, as such, and during judicial proceedings, and then it is called a *judicial confession;* (*b*) or it is made out of judicial proceedings, and then it is termed an *extrajudicial admission.* Both judicial and extrajudicial admissions occur in matrimonial causes. Of course, it is needless here to say that confessions are the statements or admissions of the *principals* or *litigants* themselves, namely, of the plaintiffs or defendants, not those of third parties, or of witnesses. Hence also the statements of the principals are called *assertions* or *confessions;* whereas the statements of third parties, namely of witnesses, are termed *testimony*.[2]

§ I. *In General.*

476. Q. What is the force or weight of a judicial confession made in ecclesiastical causes other than matrimonial?

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[1] Schulte, Eheproc. p. 156.

[2] Card. Kutschker, l. c. vol. v. p. 877.

A. An admission made in court, in so far as it is *against* the person making it,[1] constitutes, by itself, the fullest juridical proof, provided it be made (*a*) by a person who is of age—i.e., 25 years old—and who therefore comprehends fully what he is doing; (*b*) with freedom; for a confession extorted by threats, or obtained even by promises, is of no force; (*c*) in a clear, specific, and definite manner; (*d*) not from error or misapprehension; (*e*) with full deliberation and attention, and not under excitement, or in anger. Hence an admission made in answer to questions or cross-questions, asked by the judge or another party, has not the force of a confession proper. For it is supposed to be made without due deliberation or thought and under excitement.

477. Q. What is the force of an extrajudicial confession in ecclesiastical causes other than matrimonial?

A. We premise: An admission made outside of judicial proceedings is made (*a*) either verbally, i.e. orally, (*b*) or in writing, v.g., in letters. Now it is evident that an admission which is made verbally will, if denied, have no force whatever, unless it is fully proved, v.g., by two witnesses, that it was really made. An admission made in writing or letters is proved by the production of the letter or writing.[3]

478. We now answer: In civil causes an extrajudicial confession constitutes by itself full proof, provided it be made in the manner and with the conditions required for judicial confessions, namely, with due deliberation, clearness, etc., etc., and in the presence of the opponent.[4] In short, it must appear that the confession was made freely and deliberately. We say, *in civil causes;* for in criminal causes such a confession constitutes merely a presumption of guilt.[5] Hence, as will be seen, the force of extrajudicial admissions is not nearly as great as that of judicial confessions.

[1] Reg. juris 74 ff.; L. ult. C. de conv. fisc. deb.; De Angelis, l. v. t. 18, p. 9.

[2] Card. Kutschker, l. c. vol. v. p. 843.

[3] De Angelis, l. ii. t. 18, p. 19.

[4] Cap. 10, de Prob.

[5] Our Elements, vol. ii. n. 823.

§ 2. *In Matrimonial Causes of Nullity.*

479. *Admissions or confessions in matrimonial causes of nullity.*—We shall now see what, if any, is the weight of confessions or admissions for or against the validity of a marriage contracted.

480. Q. What is the weight of a confession or admission *against* the validity of the marriage contracted?

A. The Instr. Austr. § 148 answers thus: "Confessio, quam conjuges in ipsa inquisitione (during the trial) faciunt, aut anteriori tempore, attamen *post* matrimonium, quod accusatur, jamjam contractum fecerunt, in quantum *adversus matrimonii valorem* pugnat, omni vi caret. Confessio, quam conjuges, *antequam* matrimonium accusatum contraxerant, deposuerunt, qua nullitatem probandi medium rejicienda haud est." In other words, an admission of one or even of both spouses, which militates *against* the validity of a contracted marriage has of itself no weight whatever,[1] when it has been made *after* the marriage has been contracted by them, no matter whether the admission has been made judicially or extrajudicially, orally or in writing, expressly or tacitly, etc.[2]

481. The reason is plain. For married people frequently grow tired of each other, and wish even mutually to break their marriage, so as to be free to marry again. What more natural then, under these circumstances, than that they should agree either expressly or tacitly to state that such or such a diriment impediment existed at the time of their marriage, and rendered it null? Hence also neither their contumacy in refusing to appear for trial, nor any other similar act of theirs, can be taken as a presumption against the validity of their marriage.[3]

482. A case in point is given in the cap. 5 *de eo qui cog-*

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[1] Cap. 1 de eo. qui cogn. (iv. 13). [2] Card. Kutschker, l. c. vol. v. p. 854.

[3] Our Elements, vol. ii. n. 1486 sq.

novit. A husband and wife stated or admitted that the diriment impediment of affinity existed between them at the time they were married, and that consequently their marriage was invalid. This statement or confession of theirs was corroborated by rumor existing among their neighbors. Pope Celestine, to whom the case was referred, decided that the marriage should not be annulled owing to this confession, because, as he says, "quandoque nonnulli inter se contra matrimonium velint colludere."

483. The principle that the confession or testimony of either of the married couple, or even of both, has of itself no force against the marriage, holds, no matter whether the annulment of the marriage is demanded by one of the spouses, or by a third party, or by the bishop's curia *ex officio*. We say, *of itself*. For it is plain that under certain circumstances the admission or testimony of the married spouses against the validity of their marriage may be deserving of some weight. Thus where the marriage is contested by a third party or *ex officio*, and where therefore both spouses become defendants, and where in consequence it is evident that the couple do not desire the dissolution of their marriage, a confession made by them against the validity of their marriage ought to have no inconsiderable force,[1] though it does not constitute full proof, but merely a presumption.

484. When the statement or admission of the married couple, or of either of them, against the validity of their marriage is made by them *prior* to their marriage whose annulment is being demanded, and therefore at a time not suspected, it is not indeed a full proof, but is nevertheless an imperfect proof, or a presumption against the validity of their marriage.[2]

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[1] Card. Kutschker, l. c. p. 846.

[2] Arg. cap. 1 de consang. (iv. 14); Schulte, Eheproc. p. 156.

485. Q. Does a confession or an admission of the married couple, or of a third party who is the plaintiff, *for the validity* of the marriage contracted, constitute proof?

A. The Instr. Austr., § 149, answers thus: "Confessio conjugum, quae *pro matrimonii valore* militat, vim probandi in iis habet casibus, in quibus conjugibus adcusandi jus privative reservatur. Alias præsumptionem tantum generat." Accordingly when there is question of the invalidity of a marriage already contracted, because of an alleged diriment impediment which is *juris publici*, the confession of the married couple, or of either of them, *in favor* of the validity of their marriage, may constitute an imperfect proof, or a presumption, but it does not constitute full proof. For marriages contracted with an impediment *juris publici* are a violation of the law of the Church, and adverse to public morality. Consequently it is of public interest that the validity of marriages alleged to have been contracted with such an impediment shall be established independently of the admission of the married couple.

486. But when there is question of the invalidity of the marriage on account of a diriment impediment *juris privati*, then we must distinguish between the spouse who *demands* and the spouse who *opposes* the annulment. If, during the matrimonial process, the spouse who *demands* the annulment admits or confesses deliberately, freely, and before the judge that no impediment *juris privati* existed at the time of the marriage, or that if it did it has ceased, v.g., by express or tacit renewal of the consent, then indeed such a confession has the effect of fully proving the validity of the marriage. But the admission or the confession *in proof of the validity* made by the spouse who is *opposed* to the annulment has no force; otherwise the latter, by his or her sole *assertion* or statement, could destroy the plaintiff spouse's right to have the marriage annulled.

487. Finally, we observe that even where the annulment

of a marriage is demanded, not by any of the spouses, but by a third party or *ex officio* (which can be done only where there is question of an impediment *juris publici*), an admission or confession by such third party or *ex officio* plaintiff, *in favor* of the validity of the marriage sought to be annulled, would naturally destroy the very basis of his demand, and would thus operate against it and in favor of the validity of the marriage.[1]

488. From what has been said it will be seen that the weight and bearing of a confession in a matrimonial cause is vastly different from that in other ecclesiastical causes. It will also be seen that, even in matrimonial causes, the admission or statement of the married couple is of considerable importance. Hence, also with us, in all trials involving the validity of a marriage already contracted, both the married parties, i.e., the husband and the wife, must always be examined in court, and that separately and under oath.[2]

489. However, the statements of the spouses or principals which are made under oath do not constitute canonical proof as against the validity of a marriage, as we have already explained. Thus the Instr. Austr. § 169 says: "Jusjurandum a conjugibus praestitum aeque ac eorundem confessio probationem de impedimento obtinente suppeditare aut supplere nequit." We say, *as against*, etc. For, in the case of impediments *juris privati*, the sworn statement of a spouse may be admitted as proof of the validity of the marriage. The Instr. Austr. § 171 enacts: "Si impedimenti natura prohibeat, ne ex officio procedatur, jusjurandum conjugis matrimonii valorem asserentis qua probatio pro matrimonio admitti potest."

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[1] Card. Kutschker, l. c. vol. v. p. 846.

[2] Instr. S. C. de P. F. cit. § 18.

ART. II.

WITNESSES.

490. As in other causes, so also in matrimonial causes of nullity, the testimony of witnesses is the most important of all proofs, as well as the one most frequently employed.[1] For in these matrimonial causes there is always question of establishing the fact that an alleged diriment impediment exists, and that consequently the marriage is invalid. Now this fact, like other facts in general, is proved, as a rule, better by witnesses than by any other kind of evidence. We shall treat the subject in the following order: 1° What are witnesses; 2° Who can be witnesses; 3° What is the weight of their statements; 4° Production or attendance of witnesses; 5° Their examination; 6° Publication of their testimony.

§ 1. *What is a Witness?*

491. When two or more persons dispute with each other about the truth or existence of a certain thing or fact, they naturally call upon outside or third persons having a knowledge of the disputed facts to corroborate their respective assertions or claims. These outside persons are called witnesses, and their statements, testimony. Hence, speaking in general, witnesses are third or outside persons who give information in regard to a fact, action, or condition which is being disputed among two or more litigants.[2]

492. We say, *third or outside persons;* that is, persons who are not themselves involved or concerned in the disputed

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[1] Consequently the Instr. S. C. de P. F. of 1884 takes great pains to lay down clearly and in explicit detail, under articles 12, 13, 14, 15, 16, 20, the rules which are to be observed in the production and examination of witnesses in matrimonial causes of nullity.

[2] Schulte, Eheproc. pp. 165, 166.

matter, and who are therefore presumed to be willing and able to tell the truth. Consequently the disputants themselves—v.g., the plaintiff and the defendant—are not witnesses.[1] For nobody can be a witness in his own cause. They are the principals. They can and should state their case or claims. And in this sense they are often sworn and depose in judicial proceedings. But their statements, even though made under oath, are *assertions*, not proofs. The statements of third or outside persons alone constitute *proof;*[2] hence they alone can give, in judicial proceedings, the judge a moral certainty in regard to the *assertions* or claims of the disputants. The statements of the principals—i.e., of the plaintiff and the defendant—are simply taken as their prejudiced and interested views, and serve to bring out clearly the issue or the points in dispute, but have no force of proof by themselves. Only when they are corroborated by third persons, who are impartial spectators, or by other competent proof, do they acquire credibleness.

493. Witnesses are judicial or extrajudicial according as they testify in or out of judicial proceedings. We shall speak here of judicial witnesses only. For the procedure to be observed in adjudicating upon the alleged invalidity of a marriage already contracted is a judicial one. And consequently the witnesses who testify in such procedures are judicial witnesses. It will be seen that a witness in a matrimonial cause of nullity is a third or outside person, who states before the ecclesiastical judge or the moderator of the matrimonial court what he knows concerning the facts which relate to the validity or invalidity of a marriage contracted, which is being contested.

§ 2. *Qualifications of Witnesses.*

494. Witnesses are made use of in matrimonial disputes of nullity, as in all other causes, for the purpose of giving

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[1] Card. Kutschker, l. c. vol. v. pp. 783, 877. [2] De Angelis, l. 2, t. 20, p. 50.

the judge information worthy of belief on the facts or matter under discussion, and, by this means, of convincing him of the truth of the facts in the case, or of giving him a moral certainty with regard to them. Hence two things are required in witnesses: 1° a *knowledge* of the facts; 2° probity of character, or *trustworthiness.*[1] In other words, the law of the Church admits as witnesses those only (*a*) who are acquainted with the facts and who are consequently *able* to state them; (*b*) those who are of good character, and who therefore are *willing* to tell the facts *truthfully.*[2] Those who lack these conditions are rejected by law as incompetent or disqualified witnesses. In fact, it will be easily seen that all the rules of ecclesiastical law on the competency of witnesses, also in matrimonial causes of nullity, may be reduced to these two leading qualifications.

495. Accordingly, as we show in our Elements of Ecclesiastical Law, vol. ii. n. 825 sq., some persons are disqualified as witnesses *absolutely* and in all cases; others only *partially*, that is, only in certain cases, or only for or against certain persons.

496. Q. What persons are disqualified as witnesses absolutely, and therefore also in matrimonial causes of nullity?

A. 1° All those who are bereft of the use of their *reason* or of their *senses*, either at the time when the fact in dispute occurred or when they are to testify to it. The first makes it impossible for them to *know* the fact; the second, to *state* it to the judge. To this class belong (*a*) infants, and, in fact, all persons under the age of 14; (*b*) idiots; (*c*) intoxicated persons; (*d*) the blind, the deaf and dumb, in regard to matters or facts which can be known only through the eyesight, or the hearing, etc. However, at the present day the deaf and dumb can, by means of signs, now reduced to a science, easily understand others who know their mute language. Hence, under these conditions, they are no longer absolutely disqualified. It will be seen that, with this exception, the above persons are unfit to be witnesses in all causes and for or against all persons, because they lack the requisite *natural or physical* qualities, and therefore *cannot know or state* the facts.[1]

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[1] Arg. cap. 1 de test. (ii. 20).

[2] De Angelis, l. 2, t. 20, p. 50.

497. 2° Others are absolutely barred from being witnesses because they are destitute of the necessary *moral* qualifications, and are therefore not looked upon by the law as disposed to tell the facts truthfully, even though they know them. To this class, speaking in general, belong all those whose character, conduct, or status is not good, namely, persons who are infamous by law or fact; those who are under judicial accusation for crime; those who have been judicially convicted of crime; liars and perjurers; excommunicates; etc.[2]

498. Q. What persons are disqualified only partially?

A. The above persons are wholly excluded from being witnesses because they are presumed to be absolutely devoid of a due knowledge of the facts, or of the requisite sincerity to tell them truthfully. Others there are who may know the facts and also be willing to state them truthfully with regard to some causes or some persons, but not with regard to other causes or other persons, owing, generally speaking, to the fact that their *affections*, *feelings*, or *interests* are so strong in the case as to prevent them from telling the truth.[3] Hence some persons are incompetent as witnesses in *some causes*, but not in others; for or against *some persons*, but not for or against others. To the class of persons who can testify in some *causes* only belong, v.g., women and persons under the age of twenty, who are competent witnesses in civil but not in criminal causes.[4] To the class of persons who can testify for or against certain *persons*, but not for or against others, belong parents and children, brothers and sisters, and other near relatives, who cannot testify for or against each other, though they can testify for or against others.[1]

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[1] Our Elements, vol. ii. n. 825.

[2] München, vol. i. pp. 131, 132.

[3] De Angelis, l. 2, t. 20, p. 53.

[4] Our Elements, vol. ii. n. 829.

499. Here it may be observed that the burden of proving the incompetency of a witness lies upon the person objecting to his admission. For the law of the Church presumes that everybody possesses the requisite natural faculties to be able to know the facts and the moral qualifications inducing him to state them truthfully; and that, therefore, everybody is a competent witness until the contrary is proved.

500. Q. What are the special rules as to the competency of witnesses in matrimonial causes of nullity?

A. 1° Speaking in general, the rule applies, of course, also here, that only those persons are recognized by law as competent witnesses (*testes idonei et fideles*) who *know* the facts and are willing to *tell them truthfully*. Accordingly, the Instr. Austr. § 151 says: "De testibus (in causis matrimonialibus) admittendis vel respuendis, de fide ipsis habenda et exceptionibus eisdem oppositis tribunal matrimoniale *juxta generales juris canonici normas*, et peculiares, quos negotii natura postulat respectus in singulis casibus judicabit."

501. 2° But when we come to apply this general rule to matrimonial causes, especially involving the invalidity of a marriage contracted, marked differences arise. Thus, in these causes, the father and mother, sisters and brothers, cousins and nieces, and other relatives are, as a rule, perfectly competent witnesses for or against the validity of the marriage.[2] For they know better than others the character, actions, and conduct of the married couple; they are also, as a rule, willing to tell the facts truthfully, as they are natu-

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[1] Our Elements, vol ii. n. 827, 828.

[2] Cap. 3 qui matr. acc. (iv. 18).

rally opposed to invalid marriages of their relatives, which would bring dishonor upon their families and kindred.[1]

502. Nay, in matrimonial causes, where the validity of a marriage contracted is impugned because of the impediment of consanguinity or affinity, parents and relatives by blood or marriage are, as a rule, the very best witnesses, and to be preferred to all other witnesses, and that either for or against the marriage.[2] The reason is that they naturally know the degree and kind of relationship better than outsiders, and are also, as a rule, willing to tell the facts truthfully, since they are naturally opposed to incestuous marriages, which reflect dishonor upon them and, in general, bring other evils in their train.[3]

503. We say, *as a rule;* for in certain circumstances the testimony of parents and relatives may become suspected and consequently inadmissible, v.g., where they testify in favor of the validity of a marriage contracted by a poor female relative with a rich, noble, and powerful man.[4] For the presumption in this and similar cases is that the advantages of such a marriage are so great as to warp their judgment and render them incapable of giving impartial testimony.

504. Accordingly, the Instr. Austr. § 155 says: "Consanguinei conjugum a testimonio pro matrimonio aut contra illud ferendo tunc tantum excludendi sunt, quando ex individua casus natura peculiares oriantur rationes, eos de partium studio suspectos habere." And again, under art. 156, the above Instr. says: "In dijudicanda credibilitate consanguineorum et omnium personarum quarum ad conjuges relatio partium studii suspicionem inducit, imprimis considerandum est, an conjuges nullitatem matrimonii exoptent nec-ne."

[1] Card. Kutschker, l. c. vol. v. p. 884.

[2] Cap. 5, de test. (ii. 20); Can. 1 sq. C. 35, Q. 6.

[3] Card. Kutschker, l. c. vol. v. pp. 884, 886; Schulte, Eheproc. pp. 169, 170.

[4] Our Elements, vol. ii. n. 1507.

505. 3° Again, as we have already seen, *women* are not competent witnesses in the graver causes, such as criminal causes. But in matrimonial causes, especially of nullity, they are perfectly competent, in fact, are not unfrequently the very best, witnesses.[1] Hence they are expressly admitted by law as competent witnesses in matrimonial causes of nullity. The reason is that, from the very nature of the facts, they know them, as a rule, better than any one else, and are also usually willing to tell them truthfully. Hence women, whether they are relatives or not of the contending spouses, are competent witnesses. Midwives are competent even as expert witnesses.

506. 4° Likewise *friends* are competent witnesses in matrimonial causes on the ground that they usually know the facts better than strangers.[2]

507. 5° The accuser proper of the marriage, or the formal petitioner for the annulment, cannot be a witness, on the general principle that nobody can be principal and witness in the same cause or matter. He is, indeed, examined under oath.[3] But his statements are simply those of the plaintiff stating his case; they are not proofs in any sense. We say, *accuser proper;* that is, the person—the spouse, or a third person, or the curia *ex officio*—who makes the formal, judicial petition for the annulment of the marriage. Hence persons who merely inform the ecclesiastical authorities of the nullity of a marriage, and thus by their denunciation give occasion to judicial proceedings against it, are not accusers proper, but merely denouncers, and are consequently not precluded from being witnesses in the marriage which they have denounced.[4]

508. From the foregoing it will be seen that all persons are admissible as witnesses in matrimonial causes of nullity who are supposed to have a knowledge of the facts bearing

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[1] Schulte, Eheproc. p. 168.

[2] Kutschker, l. c. p. 884.

[3] S. C. de P. F. Instr. cit. § 17.

[4] Schulte, Eheproc. p. 177.

on the alleged diriment impediment. But it should be borne in mind that, as in the case of parents and relatives, so also in the case of women, and friends, and all others who are admissible, there may be special circumstances which will bias or influence them unduly for or against the parties or the marriage, and which will consequently render their testimony suspected. In such a case they can and should be admitted as witnesses, not because their testimony, which is suspected under the circumstances, constitutes proof, but because it may establish presumptions and give the judge clues to make further inquiries. Thus the Instr. Austr. § 157 says: "Omnes ii, de quibus supponendum est, quod circumstantiarum, quae in nullitatis quaestionem influxum exercent, bene gnari sint, etiam tunc audiri debent, quando qua testes repellendi forent, quia depositiones eorum praesumptiones stabilire ac viam ulterioribus recludere possunt dilucidationibus."

509. Q. By whom can and should the objections against the admissibility or competency of witnesses be made in matrimonial causes of nullity?

A. The Instr. Austr. § 158 thus answers: "Tam partes quam defensor matrimonii jus habent, testibus pro matrimonio aut contra illud productis exceptiones opponendi." In other words, the parties, that is, the plaintiff and the defendant, as also the *defensor matrimonii*, can object to witnesses. It should be observed that witnesses who are absolutely incompetent must be rejected by the judge himself, *ex officio*, even though the parties and the *defensor* do not object to them. Moreover, with regard to all other witnesses, the judge or moderator should bear in mind that it is insufficient that no objection has been made or proved against them by the parties or the defender of the marriage, but that he should have positive evidence—v.g., the certificate of their parish priest — of their probity and credibleness. Otherwise their testimony would not be fully competent.

Of course, as we have seen, the judge can and should admit as witnesses all who are not absolutely incompetent, even where objections are made and proved against them. But their testimony constitutes, at most, presumptions, not proofs.[1]

§ 3. *Weight and Authority of Witnesses.*

510. Witnesses are produced for the purpose of establishing a disputed fact, that is, of convincing the judge of the truth or untruth of some asserted fact, act, or condition. In matrimonial causes of nullity they are made use of in order to show the judge the existence or non-existence of an asserted impediment which would annul the marriage contracted, and of all the facts connected therewith.

511. Q. What, then, is the force or weight of witnesses in matrimonial causes of nullity?

A. The sworn statements of two direct witnesses who are above all objection, and who agree on the same point, constitute full proof in matrimonial causes of nullity,[2] as in other ecclesiastical causes.[3] In other words, two witnesses who are sworn, concordant, direct, and unobjectionable, fully prove the existence of an alleged diriment impediment and the consequent invalidity of the marriage.[4]

512. Thus the Instr. Austr. § 165 says, in regard to witnesses in matrimonial causes: "Quod a *duobus testibus*, quibus nulla exceptio in lege fundata opponi potest, distincte ac conformiter depositum est, in quantum haud alia testimonia fide digna aut circumstantiae, quae gravem praesumptionem stabiliant, refragentur, de regula *plene probatum* censeri debet. Verum quando de circumstantia agitur, a qua valor matrimonii dependet, minime sufficit, relationem vel factum, quo testium veracitas in dubium vocetur, evictum haud esse,

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[1] Schulte, Eheproc. p. 172.

[2] Eugen. III. cap. 5 de test. (ii. 20).

[3] Cap. 23 de test.

[4] Mansella, l. c. p. 189; Schulte, Eherecht, p. 458; Idem, Eheproc. p. 176.

sed oportet probatum sit, eos intemeratae probitatis et suppositioni quasi perjurio conscientiam gravare possint, haud locum esse."

513. We say, "*two* witnesses;" hence the testimony of *one* witness, even though perfectly reliable, is not sufficient to establish the invalidity of a marriage contracted.[1] This law requiring at least two witnesses is based upon a correct and true estimate of human nature. One witness, no matter how good he may be, may err in his memory as to the facts, or he may be unconsciously biassed. Hence one witness is not sufficient to give the judge that *moral* certainty of the existence of the alleged impediment which is requisite for a just decision.

514. We say, "the *sworn* statements;" for, as in other contentious causes, so also in matrimonial causes of nullity, witnesses are required, before testifying, to swear that they will tell the truth; otherwise their testimony is of no weight whatever.[2] We say again, "*direct* witnesses," that is, witnesses who know the facts directly, or by means of their own senses, v.g., by their own eyes or ears, and not merely indirectly, or through others. For witnesses who testify to what they have not themselves seen or heard, but merely to what they have heard from others (*testes de auditu*), or to what they *infer* or guess from certain signs (*testes de credulitate*), no matter how numerous, may constitute a presumption, but not proof.

515. We say also, *who agree on the same point;* for, if one witness testifies to one fact, and another witness to a different fact, they are not two concordant but two differing witnesses. We say finally, *and who are above all objection;* in other words, the witnesses must bear an unstained and honorable character, so that their veracity cannot in any way be called in doubt. Hence the Instr. of the S. C. de

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[1] Cap. 22, 47, de test.

[2] S. C. de P. F. Instr. cit. § 12.

P. F. *Causae Matrimoniales*, § 16, prescribes that a certificate of the parish priest or other trustworthy persons attesting the probity and trustworthiness of the witnesses shall be presented in court.

516. Finally, the testimony of two unobjectionable witnesses constitutes full proof, provided it is not weakened or contradicted by other witnesses worthy of belief, or by circumstances which create a grave presumption. Consequently where two witnesses, apparently above all exception, who have testified to the existence of the alleged diriment impediment, and the consequent invalidity of the contested marriage, are contradicted by other witnesses worthy of belief, or by facts creating a grave presumption, produced by the defendant spouse or by the official defender of the marriage, the judge cannot declare the marriage invalid. For the impediment would not have been fully proven.

§ 4. *Production of Witnesses.*

517. Witnesses, also in matrimonial causes of nullity, are made use of to convince the judge or auditor. Hence they should give their testimony before him. Consequently they are to be produced before him. For this purpose the party —plaintiff or defendant, or also the *defensor matrimonii*— gives the names of those witnesses whom he wishes to produce, to the judge or auditor, and asks him to summon them to appear and give testimony before him. This request is called the production of witnesses,[1] not because by it the party actually produces the witnesses, but because by it he does all that lies in his power to bring them before the judge. The rest devolves on the judge himself. Therefore, when the judge or moderator has received the list of names of the witnesses, and the request to summon and hear them, he issues the citation commanding them to appear before

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[1] De Angelis, l. 2, t. 20, p. 65.

him in order to give their testimony. In case they refuse to appear, they may be compelled by punishments to obey. Thus it will be seen that the production of witnesses includes (*a*) their citation; (*b*) their appearance; (*c*) their compulsion; (*d*) the time for producing them. We shall briefly touch upon each of these points, especially with reference to matrimonial causes of nullity.

518. Q. Whether and how witnesses are to be cited in matrimonial causes of nullity?

A. 1° They are, as a rule, to be formally *cited*, and that in writing, by the judge or auditor, just as in other causes, criminal or civil. This is expressly enacted by the S. C. de Prop. Fide, Instr. *Causae Matrimoniales*, §§ 16, 20, as follows: "Post conjuges, citandi erunt testes." The reason is that a witness who presents himself spontaneously becomes naturally suspected. We say, *as a rule;* for where a witness is *asked* by a party, and is willing to come without a formal citation, the latter does not seem necessary. For, having been asked to come, he is not a spontaneous witness.

519. 2° The *form* or *wording* of the citation may be as follows: "You are hereby commanded" (or "requested," where the judge thinks the witness will obey) "to appear before the undersigned judge, at such a place (v.g., at the Cathedral residence, New York City) and at such a time (v.g., 10 A.M., Aug. 10, 1892), in order to testify in regard to the marriage of James Jones and Paulina Jones, which is being contested." The citation is signed by the judge and attested by the secretary.

520. 3° As to the *manner of serving or delivering* the citation, the parish priest of the witnesses will often be the best person to serve it, especially where the witnesses are uneducated lay people, who would not understand its meaning or the obligation of obeying it. The contending parties themselves may help to serve it or see that it is served. It may

also be sent by registered mail, or by any good, trustworthy person who will explain its contents, etc., to the witness.

521. Q. If a witness refuses to obey the citation, can he be *compelled* to appear?

A. The judge or moderator, also in matrimonial causes, can certainly compel recalcitrant witnesses to appear, and that by ecclesiastical punishments, v.g., by excommunication. Whether this would be advisable in a particular case, it is for the judge or auditor to determine. Where it is impracticable to compel the attendance of a material witness, the fact should be noted in the minutes, and his testimony supplied by other evidence as far as possible.[1]

522. Q. What is to be done when the witnesses live a considerable distance from the court?

A. Two cases are to be distinguished: one, where the witnesses live indeed a considerable distance from the court, but yet in the diocese where it is held; the other, where they live outside of such diocese. In the first case, the judge or auditor may delegate an ecclesiastic who lives near the witnesses to examine them.

In the second case, the procedure to be observed is laid down in the Instr. *Causae Matrimoniales*, § 15, thus: "Si aliquando contingat examinandos apud exteras et forsan longinquas regiones versari, nec tribunali se sistere posse, a moderatore actorum accurata factorum et circumstantiarum, quarum cognitio et confirmatio requiritur, expositio erit facienda, quae concinnatis opportunis interrogationibus, de sententia quoque defensoris matrimonii, et indicatis examinandorum nominibus, ad Ordinarium loci, in quo commorantur, mittatur, ut ille sive per sive per suum vicarium generalem sive per alium virum probum et expertum e clero eligendum, eos examini subjiciat juxta datas interrogationes, requisito prius juramento de veritate dicenda, et caeteris servatis quae supra praescripta sunt." It will be observed that this rule is applied by the S. C. de Prop. Fide to *all* who are to be examined, and therefore not merely to witnesses, but also to the *spouses* who may live far away.

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[1] Arg. Instr. S. C. de P. F. *Cum Magnopere*, § 20.

523. Q. When and how are witnesses to be produced in matrimonial causes of nullity?

A. 1° As a rule, witnesses are not to be produced and examined juridically until after the *litis contestatio;* that is, until after the principals have juridically stated their respective case or demands. Thus the Instruction *Causae Matrimoniales* of 1884 ordains, in articles 17, 18, 19, that the accuser of the marriage and the spouses shall be heard first. By their sworn deposition the issue will be clearly determined, and thus the issue joined. Thereupon the witnesses are examined. For the latter are made use of to confirm what the principals have asserted. We say, *as a rule.* For the exceptions, see our "New Procedure," n. 254 sq.

524. 2° The witnesses of the accuser of the marriage are to be produced and examined first. For the burden of proof lies upon the person asserting the impediment and therefore claiming the invalidity of the marriage. Next the witnesses for the defence, i.e., for the validity of the marriage, are produced, to show that the asserted impediment does not exist in the case.

525. 3° The opposite party, or the party against whom the witnesses are produced, and the defender of the marriage are to be cited, on pain of nullity of the procedure, to be present when the witnesses appear and take the oath, so that they may make their legitimate exceptions or objections against their admission.[1] Thus the Instr. Austr. § 164 says: "Ad jusjurandum a testibus praestandum conjuges ac, si matrimonium a tertio quodam accusetur, iste quoque, vocandi sunt, attamen vocatorum absentia, quin jusjurandum excipia-

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[1] Cap. 2 de test.

tur, impedire nequit." The reason is plain. For, as we have shown, the opposite party has a right to object to the admission of incompetent witnesses. Hence he is to be cited, in order to be able to make his objections.[1] Consequently, as Gasparri (n. 1196) says: "Nomina testium (in causis matrimonialibus) unius partis sunt alteri parti patefacienda, quae potest exceptiones proponere, et testis alteriusve partis juramento assistere."

526. Q. Can the same witness be produced more than once in the same cause, also in matrimonial processes of nullity?

A. Yes, before the testimony becomes known or is published; but not after that, except on a new point.[2] Otherwise there would be danger of fraud and corruption.

§ 5. *Examination of Witnesses.*

527. When the witness, having been duly cited, appears in court, he is first sworn in the presence of the opponent, or of the spouses and the defender of the marriage, and then gives his testimony, or, as we usually say, is examined, because he gives his testimony in the form of answers to questions put to him. After the examination, his testimony is read to him, and then signed by him. Here, then, three questions present themselves: 1° How are witnesses to be examined? 2° On what matters? 3° How should they answer?

528. Q. How are witnesses examined in matrimonial causes of nullity?

A. 1° The witness must *swear*, before testifying, that he will tell the truth, the whole truth, and nothing but the truth, in answer to the questions put to him.[3] This oath is absolutely necessary in matrimonial causes involving the validity of marriages already contracted.[1] Nay, it cannot be omitted in these causes, even though all the parties concerned should consent.[2] Because in these causes there is question not only of the rights of the parties, but also of the marriage. Hence, if the oath is omitted the testimony of the witnesses will be of no value whatever.[3] Moreover, the witnesses may be sworn to keep their testimony secret, if the judge deems it proper. The oath should be taken in a *solemn and impressive* manner, and the witness while being sworn should touch the holy Gospels with his right hand.[4]

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[1] Schulte, Eheproc. pp. 178, 179.

[2] Cap. 46 de test.

[3] S. C. de P. F. Instr. cit. § 12.

529. 2° The witnesses should be examined *separately*, that is, apart from each other, in order to prevent collusion. This is strictly obligatory in matrimonial causes of nullity.[5] The husband and the wife are also to be examined apart from each other.[6]

530. 3° The examination should, as a rule, be held in the place *where the court holds its sittings* (*in loco judicii*). We say, *as a rule;* for where the witnesses are ladies, or nuns, or infirm, old, etc., the judge, or an ecclesiastic delegated by him, may take their testimony at their own house,[7] observing, however, all the prescribed formalities.[8]

531. 4° The testimony should be *written down* by the secretary very carefully, and, as far as possible, word for word.[9]

532. 5° When the witness has finished his testimony, it must be *read for him* in its entirety, by the secretary, and then, if found correct, signed by him, by the judge or auditor, and by the defender of the marriage, and attested by the secretary.[10]

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[1] Cap. 5, 47 de test. (ii. 20).

[2] De Angelis, l. 2, t. 20, p. 73.

[3] Cap. 51 de test.; Instr. Austr. § 162.

[4] S. C. de P. F. Instr. cit. § 12.

[5] Ib. § 13.

[6] Ib. §§ 13, 18.

[7] Instr. Austr. §§ 146, 160.

[8] Our Elements, vol. ii. n. 844.

[9] S. C. de P. F. Instr. cit. §§ 6, 13, 14.

[10] Ib. § 14.

533. Q. On what matters should witnesses be examined in matrimonial causes of nullity?

A. 1° First, certain general questions should be put to them, namely, what their name and surname is, their age, condition, occupation, place of birth, etc.[1]

534. 2° Next they should be examined on the matrimonial cause itself which is being disputed. In other words, they should be asked concerning the particular *diriment impediment* which, it is alleged, annuls the marriage, and *all the circumstances* connected with it. The questions, therefore, to be put to the witnesses, in each cause, depend on the nature of the particular diriment impediment.

535. 3° The questions are framed and submitted to the judge by the parties or spouses,[2] or by their advocates, and especially by the official defender of marriage, whose right and duty it is to propose questions to *every person* who is examined. The questions may be put to the witnesses either by the judge himself, or, with his leave, by the official defender, or by the advocates of the parties.

536. 4° According to the Instr. S. C. C. 22 Aug. 1840, § *Praefinita die*, the official defender of the marriage is obliged to write out all his questions beforehand, and hand them sealed to the judge, in open court, in order to be then and there opened and put to the witnesses and parties. The Instr. of the S. C. de P. F. for this country does not prescribe this, but merely enacts: "Interrogationes singulis faciendae, prout accusationis titulus, aut allata factorum et circumstantiarum congeries, vel ipsa testium indoles atque capacitas requirere videatur, *sagacitati atque prudentiae moderatoris actorum et defensoris vinculi relinquuntur qui illas concinnare, augere, aut imminuere poterunt*, dummodo tamen semper ea omnia inquirantur quae ad rectum proferendum judicium aut necessaria aut opportuna censeantur."

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[1] S. C. de P. F. Instr. cit. § 13.

[2] Instr. Austr. § 161.

537. 5° Leading questions should be carefully avoided. Moreover, the witnesses should all be examined in *as quick a succession* as possible, that is, with as short an interval as possible between them. In this manner, expedition, so much desired in all, especially matrimonial, causes, is obtained; conversations between the witnesses and spouses are also hindered, and thus collusion is prevented.[1]

538. Q. How should the witness give his testimony in matrimonial causes of nullity?

A. 1° In person; 2° *Orally*, not merely in writing. Hence the Instr. Austr. § 159 says: "Testimonium personaliter ferendum est. Scripta absentium testimonia probationem haud faciunt, sed praesumptionem tantum fundant."[2] Affidavits, therefore, or sworn written testimony, whether taken before a secular or an ecclesiastical magistrate, is not proof. Hence, as we have already said, when the witness cannot appear in person before the judge, the latter cannot be contented with his written statement, even though sworn to, but must either go to the witness, or delegate another ecclesiastic who lives near the witness, to take his testimony. 3° The witness should answer the questions as put to him; and therefore he should not go outside or beyond them, or volunteer testimony.[3] Otherwise he would be a spontaneous, and therefore a suspected witness. 4° His answers should be (*a*) *clear*, (*b*) *determined*, not uncertain, vague, or equivocal; (*c*) not *vacillating;* (*d*) free from contradictions.[4]

§ 6. *Publication of the Witnesses' Testimony.*

539. When all the witnesses on both sides have been examined, and all other proofs have been submitted on both

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[1] Card. Kutschker, vol. v. p. 785.

[2] Our Elements, vol. ii. n. 848.

[3] De Angelis, l. c. p. 75.

[4] Schulte, Eheproc. pp. 176, 177.

sides, the case is *closed.* Thereupon the entire evidence collected during the trial, and consequently also the testimony and names of the witnesses, is made known to both parties,[1] either by being read to them or, where this would last too long, by a copy of the whole testimony being given them, or by the entire records being submitted to their full and free inspection.[2] Then follows the summing up (*defensiones*) of the entire case on both sides. It will be readily seen that the main object of the publication of the evidence is to enable both parties, or rather their advocates, to make a careful and complete summing up of the case.

540. The publication of the evidence cannot be made, in matrimonial causes of nullity, until both sides have presented their entire evidence to the court, as we shall see more fully later on.[3] The object of this law is to prevent collusion and fraud on the part of the spouses. For the latter, if the testimony and evidence were communicated to them in full before the close of the trial, might easily arrange with each other to produce witnesses to break the marriage.

541. On this account also, once the publication of the evidence has taken place, witnesses, whether already produced or not, during the trial, cannot be allowed to testify on points already discussed during the trial.[4] We say, *on points already discussed;* for, in matrimonial causes of nullity, witnesses may be produced, even after the publication, on *new* points, facts, or matter discovered after the publication.[5]

Of the formalities attending the publication we shall speak later on, when we come to discuss the different stages of the trial.

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[1] S. C. de P. F. Instr. cit. § 22.

[2] Our Elements, vol. ii. n. 855; our New Procedure, n. 331 sq.

[3] S. C. de P. F. Instr. cit. § 21; Instr. Austr. § 164.

[4] Cap. 17, 18, de test.

[5] Instr. S. C. de P. F. cit. § 30.

ART. III.

EXPERTS AND OCULAR INSPECTION.

§ 1. *In General.*

542. There are cases where, owing to the peculiar nature of the asserted impediment, v.g., impotency, the claimed invalidity of a marriage already contracted can scarcely be proved or disproved in any other way than by an ocular inspection made by *experts*, that is, by persons who have a specific knowledge of the matter, not necessarily nor usually possessed by the judge or by ordinary witnesses.[1] By experts (*periti*) or scientific witnesses, therefore, we here mean those persons or witnesses who have a specific knowledge on the subject of the inquiry, that is, on the particular impediment under discussion, and who in consequence are specially qualified to be witnesses in the case. From the very nature of certain matrimonial causes, v.g., of impotency, *physicians and midwives* are the only persons employed as experts in these causes.[2]

543. By ocular inspection (*inspectio ocularis*) is meant the beholding with one's own eyes the object in dispute, and thus obtaining personally certainty of its existence or non-existence.[3] It is plain that ocular inspection is possible only when the controverted object is *external, visible, and accessible.* Hence it may and does take place where, v.g., objections are raised against building a new church or other religious edifice in a certain locality too near another church; or where there is question of fixing the boundary-lines between parishes; or also of ascertaining the impotency of married people or the non-consummation of a marriage.

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[1] Card. Kutschker, l. c. vol. v. p. 867.

[2] Schulte, Eheproc. p. 181.

[3] Leur. For. Eccl. lib. 2, t. 19, q. 536, n. 1; lib. 4, t. 115, q. 252.

544. Q. How is the ocular inspection to be made in general, and what is its force?

A. 1° The judge or his delegate may, of course, make the ocular inspection *privately* and without any juridical formalities. However, such an inspection, though often very useful for the personal information and guidance of the judge, will have no force whatever as a judicial or legal proof. In order that it may constitute canonical proof of the disputed object or fact, it has to be performed in the following juridical manner: (*a*) It should be made by the judge himself, or by some other qualified and competent person, v.g., by an expert deputed by him; (*b*) the judge or delegate inspecting has to be accompanied by a secretary whose duty it is to make a record of the results of the inspection;[1] (*c*) both the contending parties are to be cited to be present at the inspection, so that they may defend their rights.[2]

545. 2° The ocular inspection, made in the manner just described, is, as a rule, the best of all proofs. For it is evident that nothing can, as a rule, give the judge or his delegate greater certainty than his seeing the disputed object with his own eyes.[3] We say *as a rule.* For sometimes this is not the case. Thus the ocular inspection, even by experts, of the sexual organs of the husband and wife, in the case of claimed impotency or non-consummation of the marriage, is not always a reliable and certain proof.[4] For the apparent signs of impotency or non-consummation may deceive even experts.[5] Hence the law of the Church prescribes that, besides the inspection, other proofs shall also be collected, namely, the affirmation of the spouses, the testimony of third parties.[6]

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[1] Our Elements, vol. ii. p. 459, 4th edit., 1890.

[2] Leur. For. Eccl. l. 2, t. 19, q. 536, n. 1, 2.

[3] Ib.

[4] Cap. 6 de Frig. (iv. 15).

[5] Mansella, p. 203.

[6] S. C. S. O. in our Elements, vol. ii. p. 441.

§ 2. *In Matrimonial Causes of Nullity.*

546. Q. When are experts employed to make an ocular inspection in matrimonial causes of nullity?

A. 1° The general law of the Church, as still in force, enacts that experts, that is, physicians, or, in the case of women, midwives, shall be employed to examine the sexual organs of the married couple, to determine whether they are impotent or have consummated their marriage, (*a*) when it is claimed that a marriage already contracted is invalid by reason of the impediment of impotence, (*b*) when there is question of granting a dispensation *a matrimonio et non consummato*, namely, where it is claimed that the marriage, though validly contracted, was not consummated, and that the wife is still a virgin.[1]

547. From this it will be seen that the inspection is necessary in the above cases,[2] and that it is to be made, not by the ecclesiastical judge himself, but by experts appointed by him and acting under his instructions. In fact, it is plain that the ocular inspection of the sexual organs of the husband and wife could not be made, with propriety, by the ecclesiastical judge himself, even though he possessed the requisite medical and chirurgical knowledge. Hence the law prescribes that it shall be made by physicians and midwives.[3]

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[1] The inspection of the woman's organs is to be omitted if she is a widow, or where it is certain that she has had *copula carnalis* with another man. Thus the S. C. S. O. Instr. 25 Junii 1883, § 49, says: "Haec mulieris inspectio omittenda erit, si ea vidua sit, aut constiterit, post separationem a conjuge, cum quo lis est, aut etia mante, cum alio viro commercium habuisse." For it is evident that this examination, which has for its object to ascertain whether the woman is still a virgin, would be altogether useless in the case. In like manner, the inspection of the husband or the wife would not seem necessary where it is fully proved that the spouses were at no time after their marriage alone together sufficiently long to exercise the copula.

[2] Can. 5, C. 27, Q. 1; cap. 4, 6, 14, de Frig. et Malef.

[3] Our Elements, vol. ii. n. 1495.

548. 2° This law is applied also to this country by the Instr. *Causae Matrimoniales*, 1884, of the S. C. de P. F., in these words: "Hunc in finem (ad adstruendam vel excludendam assertam impotentiam) prae oculis habenda erit instructio supremae Congregationis S. Officii."[1] For the *Instructio* S. Officii here quoted provides that, in order to ascertain and prove the asserted impotence and the non-consummation of the marriage, two physicians shall inspect the body of the husband and two midwives that of the wife.[2] Where it is impossible or very difficult to have two physicians and two midwives, it is sufficient to employ *one* physician to examine the husband and *one* midwife the wife, as we have already seen.

549. 3° There are other cases where physicians are usefully though not necessarily employed as experts. Thus, when it is claimed that a marriage is invalid because it was contracted under *grave fear*, physicians are called in to examine the person said to have suffered fear, in order to determine his or her force of mind to resist threats; to see whether he or she is nervous and timid, and easily frightened, or not. In like manner, when it is asserted that a marriage is invalid because it was contracted by persons *insane* at the time, physicians can be employed to examine the person said to be insane, in order to see whether he or she really is and was insane at the time of the marriage.[3]

550. Q. What are the functions of these experts in matrimonial causes of nullity?

A. Of course, they are not supposed to be theologians or canonists. They are simply physicians and midwives, and make their examination and give their testimony or opinion as such. Consequently they should be informed by the ecclesiastical judge and the defender of the marriage bond what is to be the object of their professional examination, or what they are to ascertain and report on. Thus, when there is question of the impediment of impotency, the law of the Church, as we have seen, is that (*a*) the impotence must exist already at the time of the marriage and not merely supervene it; that (*b*) it shall be incurable, morally speaking. Consequently the physicians, acting as experts, should be instructed by the ecclesiastical judge to ascertain, by a personal examination or inspection of the sexual organs of the married couple, (*a*) whether the asserted impotence really exists, and did exist at the time of the marriage; and if so, (*b*) whether it is curable by medical science, without serious danger to life.[1]

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[1] Instr. cit. § 46.

[2] Instr. Supr. Cong. S. O. in Our Elements, vol. ii. p. 442, n. 1463, 1465.

[3] Card. Kutschker, vol. iv. § 223; vol. v. p. 867.

551. From all this it will be seen that the Instr. Austr. § 166 says very appropriately: "Quando ad probationem conficiendam rei periti (*experts*, *physicians*, *midwives*) adhibendi sint, eorum saltem duos et eos scientia et integritate praestantes omnique partium studio expertes tribunal matrimoniale seliget, *qui juxta instructionem a commissario* (judice, moderatore) *exarandam* et a matrimonii defensore adprobandam investigationem debitam habeant et animi sententiam scriptis pandant. Relate ad partium studium contra rei peritos eaedem valent exceptiones, quae ipsis, si testes agerent, opponi possent."

552. Q. By whom are the experts, that is, the physicians or midwives, chosen in matrimonial causes of nullity?

A. 1° They are appointed always by the judge, though sometimes *ex officio* and sometimes at the presentation of the parties. In other words, the appointment always belongs to the judge. But when the parties agree upon the experts, and the latter are reputable persons, he should appoint those agreed upon. If the parties do not agree upon them, he selects and appoints them *ex officio*.[2]

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[1] Schulte, Eheproc. p. 85.

[2] S. C. C. Instr. 22 Aug. 1840, in our Elements, vol. ii. p. 438, n. 1624, 1625.

553. 2° When the experts are appointed by the judge *ex officio*, the spouses or litigants can object to them just as they can object to ordinary witnesses;[1] and therefore, either as suspected of partiality, or as not of good character, or as not sufficiently skilled in their science. For an expert's testimony, like that of an ordinary witness, has weight because he is supposed (*a*) to have the knowledge specially required in the case; (*b*) to be upright and honorable, and therefore willing to make an impartial examination and to give a fair, correct, and true report.[2] If he is lacking in any of these qualifications, he should be rejected.[3]

554. Should the experts be Catholics? The S. C. S. O. answers thus:[4] "Medici et obstetrices, quantum fieri poterit inter Catholicos eligantur; si vero ex his haberi nequeant, tollerari poterit, ut *acatholici* adhibeantur, dummodo tamen aliunde constet, eos esse probos et honestos, neque a spiritu Catholicae religioni infenso duci."

555. Q. What is the weight or authority of experts in matrimonial causes of nullity?

A. As a rule, two, at least, are required to constitute full proof. The reason is that they are witnesses. Hence one alone is not sufficient; for he may be deceived, or he may be biassed.[5] Consequently the Instr. of the Supreme Congregation of the Holy Office,[6] which is the guide also in this country,[7] prescribes that, in the case of asserted impotence or non-consummation of marriage, at least two physicians, who shall also be surgeons, shall examine the husband, and two midwives the wife.

556. We say, *as a rule;* for where it is impossible or very difficult to have two physicians and two midwives, one

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[1] S. C. C. Instr. 22 Aug. 1840, in our Elements, vol. ii. p. 438, n. 1624, 1625.

[2] Instr. Austr. § 166.

[3] Card. Kutschker, l. c. vol. v. p. 868.

[4] Instr. 20 Junii 1883, § 49.

[5] Instr. Austr. § 228.

[6] See our Elements, vol. ii. n. 1643 sq.

[7] S. C. de P. F. Instr. cit. § 49, in fine.

physician and one midwife, respectively, are enough, provided their reports be submitted to two other physicians. Thus the Instr. S. O. § 49 enacts: "Quod si ob singulares locorum circumstantias impossibile aut valde difficile aliquando fuerit, ut duo medici periti, et duae obstetrices item peritae reperiantur, toleari poterit, ut *unus tantum* medicus et *una* obstetrix adhibeatur. Curandum tamen in hoc casu ut relationes utriusque examinandae subjiciantur duobus aliis medica et chirurgica scientia doctis ibidem vel alibi commorantibus, ut fide jurata judicium suum super eas proferant, num silicet iisdem sit fidendum, et num ipsae exhibeant motiva, quae sententiae ferendae solido fundamento sint."

557. It may be observed here that custom has in many places substituted physicians for midwives in the case of married women.[2] In fact, midwives are going almost entirely out of use, in this country. With us, physicians almost exclusively attend upon women in childbirth, and there are at present scarcely any midwives here. The Instr. S. O. § 49 says: "Quod si in aliquibus locis obstetrices peritae non habeantur, et inspectio corporis mulieris omnino necessaria judicetur, haec medicis peritis et honestate atque aetate gravibus committatur, sicut iisdem esset committenda, si observationes ab obstetricibus factae concludentes non reperirentur. In his autem casibus matrona honesta jurejurando ad secretum obligata ipsi inspectioni semper assistat."

558. Q. How do experts perform their duties in matrimonial causes of nullity?

A. We confine ourselves to the use of experts or physicians in ascertaining the alleged impotency or non-consummation of a marriage contracted. Having premised

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[1] S. C. S. O. Instr. 20 Junii 1883, § 49.

[2] Schulte, Eherecht, p. 97.

this, we observe that experts are *judicial witnesses.* Hence they should (*a*) first be *sworn* by the ecclesiastical judge that they will make a conscientious examination or inspection of the sexual organs, and make a true and faithful report.[1] Thus also the Instr. Austr. § 167 says: "Rei periti jurati sint oportet.' (*b*) Thereupon the two physicians inspect the sexual organs of the married couple, and make each separately a written report of its results to the ecclesiastical judge. Where midwives are employed to inspect the wife, they also are sworn, and should make each a separate written report of the inspection, which is submitted to the physicians.[2] If the latter find the matter doubtful, the midwives are to be orally examined in regard to the inspection, in accordance with questions prepared by the physicians. If, thereupon, the matter still remains doubtful, the wife should be corporally examined by the physicians themselves, in the presence, however, of some good and virtuous woman,[3] to be designated by the ordinary, after which the physicians shall make their report. Where the two experts differ, a third or, if need be, a fourth is to be chosen.

559. It is needless to add here, that their testimony, like that of ordinary witnesses, must be *clear*, *conclusive*, and to the *point*. Otherwise it would prove nothing.

560. Finally, it will be readily seen that the inspection is to be made in such a manner as not to offend in any way against the rules of propriety and chastity. Thus the S. C. S. O.[4] says: "Facile vero patet, quam sancte in omnibus hujusmodi inspectionibus cavendum sit, ne quidquam agatur, quod divinae legi et castitatis virtuti adversetur." Hence, also, only such physicians and midwives should be chosen as are above all reproach. For the rest, if there be

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[1] S. C. S. O. Instr. 20 Junii, 1883, § 49; Gasparri, l. c. vol. ii. p. 575.

[2] Schulte, Eheproc. p. 182.

[3] Instr. Supr. Congr. S. O. apud Our Elements, vol. ii. n. 1646 sq.

[4] Instr. cit. 20 Junii, 1883, § 49.

anything offensive to natural modesty in the inspection, it is justified by the necessity of the case, namely, by the fact that matrimonial causes, which involve the validity of marriages already contracted, are of the gravest moment, affect the most vital interests of the married couple, and involve the sanctity and unity of marriage itself. Consequently the ecclesiastical judge should, where it is necessary as a proof, order the inspection, which can and should be made in such a manner as not to be sinful.

ART. IV.

INSTRUMENTS AS PROOFS IN MATRIMONIAL CAUSES OF NULLITY.

§ 1. *Correct Idea and Division of Instruments.*

561. In processes or trials involving the validity or invalidity of a marriage already contracted, *instruments*, both public and private, play a very important part as proofs.[1] Now, an instrument or document (*instrumentum, documentum*), as here understood, is any *writing* which contains information or statements regarding the facts in dispute, that is, concerning the facts which show the validity or invalidity of the marriage contracted.[2]

562. Q. How many kinds of instruments are there also in marriage causes of nullity?

A. 1° All writings or instruments are divided into public and private. For all papers are written either by public or private persons. Public papers, speaking in a broad sense, are those written by public persons. We say, in a broad sense; for by public instruments in the strict and technical sense are meant, not the writings of public persons or officials generally, but only those papers which are made out, in the form prescribed by law, by a public *notary*, that is, by a public person or official who is appointed for the very purpose of drawing up and attesting papers.[1] Hence, properly speaking, the writings of public persons who are not notaries, v.g., of parish priests, or even bishops, even though in their official capacity and in matters relating to their charge, are not public instruments.

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[1] Cf. S. C. de P. F. Instr. *Causae Matr.* §§ 18, 31, 32, 33, 34, 42, 43, 44, 45.

[2] Card. Kutschker, l. c. vol. v. pp. 871, 874; Fermosini de fid. instr. ad Rubr. et Tit. n. 25.

563. We say, properly speaking; for by custom all papers executed in the manner prescribed by law, by public persons in general, v.g., by parish priests, bishops, etc., in matters pertaining to their office, and in which they are not personally interested, are equivalent to public instruments proper. The same applies to writings even of private persons, when they have a public seal, or are extracted from the files of a public archive, v.g., of the episcopal archives.[2]

564. 2° Private instruments or papers proper are those written by (*a*) private persons, and not rendered authentic, v.g., by a seal; (*b*) by public officials, but without the required formalities, or not in matters pertaining to their office.[3] The chief kinds of private writings are: (*a*) Receipts, or written statements made by creditors that they have received payment from their debtors; (*b*) A writing from the debtor to the creditor, asserting that he has paid a certain specified debt; (*c*) a written agreement signed merely by private individuals; (*d*) ordinary letters, or correspondence from one person to another; (*e*) account books.[4]

565. 3° All papers or instruments, whether public or private, are subdivided into originals and copies. The *original* is a paper written or signed by the person himself from whom it comes, or whose name it bears. Of course, it makes no difference whether a person writes out the whole

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[1] Fermosini, de fid. instr. cap. i. n. 4 sq.

[2] Our Elements, vol. ii. n. 865.

[3] Fermos. l. c.

[4] Ib. n. 9.

paper and then signs it, or whether he merely signs a paper written out by another person.[1] Every reproduction or multiplication of an original, which is made or executed by a person other than the original signer or writer, is a *copy*.[2] A reproduction or multiplication of the original which is made by the original writer or signer himself is called a *duplicate*, not a copy.

566. 4° Copies are subdivided into (*a*) authentic, (*b*) certified, and (*c*) ordinary. An *authentic* copy is that which is made by a notary public, or by other public persons, v.g., bishops or parish priests, in matters pertaining to their charge. In this sense, a copy of parochial records, v.g., a certificate of marriage, of baptism, of death, made by a parish priest, and stamped with the parochial seal, is an authentic copy. A *certified* or authenticated copy is one that is merely attested, not made out by a public official, as just stated, as agreeing with the original, or as being a true and correct copy. An *ordinary* copy is one which belongs to neither of the two classes just mentioned.[3]

567. Q. What are the principal instruments used in matrimonial causes of nullity?

A. 1° The chief *public* or quasi-public instruments are (*a*) the parochial registers or records of baptisms, confirmations, marriages, and deaths; (*b*) the certificates or copies made from these records by the parish priest and bearing the parochial seal; (*c*) genealogical tables, or tables exhibiting the descent of a person from an ancestor, made by the parish priest from the data given in the parochial registers. All these instruments are chiefly employed in proving whether there exists or not the impediment of consanguinity or affinity, of spiritual relationship, or also of a prior marriage. (*d*) Judicial proceedings of ecclesiastical courts which took place on former and different occasions. Under this head come the minutes and acts, documents and depositions of witnesses of former judicial proceedings, so far as they bear on the alleged impediment.[1] We say, *of ecclesiastical courts.* For the judicial proceedings of secular courts, even though they bear on the alleged impediment, v.g., proceedings for absolute or relative divorces, may indeed be used in ecclesiastical courts, as constituting indications or presumptions, but not proofs.[2]

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[1] Santi, l. 2, t. 22, n. 8.

[2] Card. Kutschker, l. c. vol. v. p. 872.

[3] Ib. p. 872.

568. 2° The chief *private* instruments in the causes in question are: (*a*) letters, ante-nuptial agreements, and other writings of the spouses themselves; (*b*) letters and writings of other parties, or of third persons, bearing on the alleged impediment.[3]

§ 2. *Force or Weight of Instruments.*

We shall inquire, first, into the authority or weight of documents in general; next, of those in matrimonial causes of nullity.

569. Q. What is the weight of public and quasi-public instruments or documents?

A. 1° A public instrument proper, that is, one executed by a public notary or by a sworn secretary, and with the prescribed formalities, constitutes of itself alone, that is, without any other corroborative evidence, full proof of the facts it states, either *for* or *against* the parties, and that until the contrary is proved.[4] The reason is that the law of the Church justly and reasonably presumes or takes it for granted that such a paper states the truth, *first*, because it is drawn up by a public official, who is sworn to make out such papers faithfully and truthfully; *second*, because the formalities with which these papers are drawn up presuppose mature deliberation and great care, and consequently remove any suspicion of hastiness or falsehood.[1]

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[1] Card. Kutschker, l. c. p. 875.

[2] S. C. de P. F. Instr. *Causae Matr.* § 44.

[3] Kutschker, l. c.

[4] Cap. 1, 2, de fide instr.; De Angelis, l. 2, t. 22, p. 92.

570. In fact, an instrument takes the place of witnesses. Now a witness is believed only when he is free from bias and has no personal interest in the matter. Likewise an instrument is believed to state the truth only when the one who draws it up is fair, unbiassed, and is not personally concerned in the matter. Now a notary public is always a third party, who draws up papers for other persons in matters which do not concern him personally. He is, therefore, rightly presumed to state the truth. From this it will be seen that when a notary is concerned in a matter he should not draw up the papers in such matter, but should get another notary to do so. For the presumption of law is that a person who draws up a paper in a matter in which he is himself interested will be tempted to state falsehoods.

571. We have said in our answer, *until the contrary is proved;* for even a notary is a mere human being, liable to error and subject to bias. Hence the presumption in his favor may be overturned by proofs showing that his instrument contains falsehoods, errors, and misstatements.

572. What has been said of public instruments proper, applies also, speaking in general, to quasi-public or authentic private instruments.[2]

573. Q. Has a copy of a public or quasi-public instrument the same weight as the original?

A. 1° Copies made by a private person or by private authority are of no weight whatever. 2° Copies made or attested as genuine by a notary public, or by other public officials in matters pertaining to their office, and in which they are not personally interested, have the same authority as the original.[3]

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[1] Schmalzg. l. 2, t. 22, n. 22.

[2] Cap. 1, 2, de Instr. Austr.; De Angelis, l. c. p. 97.

[3] Cap. 1, 2, et ult. de fide instr. (ii. 22); De Angelis, l. c. p. 95.

574. Q. What is the authority of purely private instruments or writings?

A. 1° As a rule, private instruments, v.g., account-books, private records, or memoranda of facts, ordinary letters or correspondence, do not prove anything whatever *in favor of the writer.* For they are simply assertions or statements of the writer. Now no person is believed in his own cause, or in a matter in which he is himself interested or concerned. This is still more apparent from the fact that if such writings or letters had the force of proof *for* the writer, anybody could easily manufacture for himself all the evidence he desired or pleased, by simply writing, for instance, a letter to another person, setting forth his statements, or pretended claims.[1] How absurd and pernicious this would be is self-evident.[2] We have said, *as a rule;* for in the following cases private instruments constitute full proof *for* the writer: (*a*) A letter which is produced in court and not impugned by the opposite party, constitutes proof in favor of the writer. (*b*) A letter which is sent and not contradicted by the recipient, in case the latter can easily make the contradiction, proves *for* the writer. Because in this case the recipient acknowledges the letter's statement as true, by not replying or contradicting them when he could do so.[3]

575. 2° Private instruments, v.g., letters, private records, etc., constitute, as a rule, full proof, like public documents, *against the writer.* For they are, so to say, permanent and standing confessions of the writer. Nay, being in writing, these confessions are regarded as having much more weight than *oral* statements or admissions. For men are accustomed to be much more careful and deliberate in writing than in speaking. This holds, of course, only in

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[1] L. 7 C. de Prob.

[2] De Angelis, l. c. p. 98.

[3] Santi, l. 2, t. 22, n. 7.

case these instruments (*a*) are produced in court, (*b*) in the presence of the opponent, (*c*) and are not impugned by the opponent. For when a private instrument is impugned, the *onus probandi*, or the burden of proving that it is genuine and true, falls not upon the one impugning it, but upon the one asserting it to be genuine and true, namely, upon the one producing it. In the case of public instruments, the reverse takes place. For public instruments have the legal presumption in their favor. Hence the burden of proving them to be false or spurious devolves upon the one impugning or attacking them.[1]

576. Q. What is the weight of instruments in matrimonial causes of nullity?

A. 1° Public or quasi-public instruments, v.g., the parochial registers of baptisms, marriages, etc., constitute of themselves, and without any other corroborative evidence, full canonical proof,[2] for or against the validity of the marriage, that is, for or against the alleged impediment.[3]

577. 2° Private instruments in matrimonial causes consist chiefly of letters and correspondence of the married couple and of third parties. (*a*) As to letters written by third persons, they may, if proved or admitted to be genuine, constitute under certain circumstances full proof of an alleged impediment. We say, *under certain circumstances;* for instance, if the letter is written by a disinterested person, of high character, before any dispute or question arose as to the impediment, etc. (*b*) As to letters written by the married couple or either of them, the general rule is that they do not prove anything whatever as against the validity of the marriage. For they are looked upon simply as admissions, statements, or confessions of the spouses, or either of them. Now, as we have seen, the confessions or admissions

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[1] Kutschker, l. c. pp. 874, 875.

[2] Ib. p. 875.

[3] S. C. C. in Milev., 1842; Kutschker, l. c. vol. iii. p. 528 sq.

of the spouses are of themselves no proof whatever *against* the marriage, or for the existence of the alleged impediment, owing to the danger or suspicion of collusion by which the spouses seek to break up a marriage of which they have grown tired.[1] We say, *as a general rule.* For such letters, when written (*a*) before there was any dispute or question as to the validity of the marriage, (*b*) or by spouses who evidently and indisputably do not wish to dissolve their marriage, may constitute proof of the alleged impediment, and therefore be good evidence as against the validity of the marriage.[2]

§ 3. *Production of Instruments.*

578. By the production of an instrument is here meant the exhibiting it in court, or the laying it before the judge, in order to prove a claim or allegation.[3] Instruments are proofs. Hence, like all other proofs, instruments must, also in matrimonial causes, be produced (*a*) before the judge, (*b*) during the trial, (*c*) in the presence of the opponent, (*d*) and of a notary or secretary; (*e*) the fact of their having been thus produced must, moreover, be noted by the secretary in the minutes or acts of the proceedings. Instruments which are not thus produced have no force or weight whatever in judicial proceedings, civil, criminal, or matrimonial. This is the manner in which, in judicial proceedings, all proofs, and consequently also instruments, are to be produced, if they are to have any weight in the case under dispute. We shall now briefly explain each of the above conditions.

579. *First*, instruments must be produced in court or *before the judge.* The reason is that, like all other evidence, they are intended to give the judge information in regard to the disputed facts.

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[1] Card. Kutschker, l. c. vol. v. p. 875.

[2] Ib.

[3] Grandclaude, l. 2, t. 22, vol. ii. p. 120.

580. *Second*, they are to be produced *during the trial;* that is, as a rule, after the *litis contestatio*, or joining of the issue by the parties, and before the parties rest their entire case and thus close the taking of testimony.[1] We say, *as a rule.*[2] For instruments or papers can be produced even after the taking of testimony is closed, 1° in causes where the definitive decision does not pass into *res judicata*—for instance, (*a*) in matrimonial causes of nullity;[3] (*b*) in criminal and disciplinary causes, so far as concerns the proving of the defendant's innocence; 2° if the person who produces them is of good character and swears that they were not found before; 3° if the parties, in resting their case, have reserved the right to produce additional instruments; 4° where the instruments are not really new ones, but merely appendices or explanations of others already produced; 5° where the judge himself finds new ones.[4]

581. *Third*, instruments, like all other evidence, are to be produced in the presence of the opponent; or if the opponent is not present, they must be communicated to him.[5] The object of this rule is to enable the adversary to defend himself against them, that is, to show that they are either spurious or interpolated, or state untruths. For, as it is but just that a person should be able to defend himself against witnesses and refute them, so it is also proper that he should have the opportunity to refute and overthrow instruments.

582. *Fourth*, the fact that they have been thus produced is to be recorded in the minutes by the secretary, together

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[1] Cap. 9 de fid. instr. (ii. 22).

[2] De Angelis, l. c. p. 105.

[3] The Instr. S. C. de P. F. *Causae Matr.* § 18 says: "Quae documenta cujuscunque generis sint, et a quocunque exhibeantur, semper erunt recipienda, et cancellarius adnotare debebit diem, mensem et annum, necnon nomen illius a quo exhibita fuerunt."

[4] Santi, l. 2, t. 22, n. 12.

[5] Cap. 5 de fid. instr.; l. 1, 4 ff. de eden. (ii. 13).

with the day, month, and year when they were presented in court, and the name of the person presenting them.[1]

583. We have seen how a person should proceed who desires to produce a paper or instrument which he considers favorable to his cause. We will now discuss the opposite case. We will suppose a person—one of the litigants or a third party—possesses an instrument, but does not wish to produce it before the judge and the parties, v.g., because it is unfavorable to his cause: can he be compelled by the judge to produce it against his will? We answer, the general rule is that no one can be obliged to produce a document which militates against him, and thus put the proofs against himself into the hands of his opponent.[2] We have said, *the rule is.* For the exceptions, see our Elements of Ecclesiastical Law, vol. ii. n. 870, 871.

584. Q. What is to be done if an instrument has been lost?

A. Speaking in general, instruments are not so necessary but that their place can be supplied by other legitimate evidence, v.g., by witnesses.[3] Speaking in particular, an instrument may be lost in three ways: 1° By accident; 2° by the fault of the person alleging the loss; 3° by the fault of the opponent, v.g., if he steals it, or tears it up.

585. In the first case, both the accident, v.g., fire, and the tenor or contents of the instrument are to be proved. The tenor or contents of the lost instrument are proved by witnesses, worthy of belief, who were present when it was written, and therefore know what it contained; or in their default, by witnesses who, though not present when it was written, yet saw and read it afterwards.

586. In the second case, the person stating the loss must prove (*a*) the tenor of the lost instrument; (*b*) the fact itself

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[1] Cap. 11 de Prob.

[2] Cap. 1 Prob. (ii. 19); De Angelis, l. c. p. 106; Santi, l. c. n. 13.

[3] L. 1 C. de fid. instr. (iv. 21).

of its loss; (*c*) the absence of fraud in the loss or that he lost it inculpably.[1]

587. In the third case, the person who affirms the loss of the instrument is bound simply to prove the iniquitous act of the opponent, v.g., his stealing or destroying the document. After this has been proved, the contents of the instrument are fully proved by the sole oath of the one from whom the instrument was taken.[2]

588. Q. What peculiar rules govern the production of instruments in matrimonial causes of nullity?

A. 1° In these causes, as we have already seen, instruments can be produced even after the close of the taking of evidence, nay, even after the final sentence;[3] whereas in other causes this cannot, as a rule, be done. 2° The judge should always, *ex officio*, see that instruments *in favor of the validity* of the marriage be presented or sought. For he is bound *ex officio* at all times to protect against wanton and unjust attacks a marriage contracted.[4] 3° Where the marriage is impugned *ex officio*, and because of an impediment *publici juris*, the judge or rather the fiscal procurator should also endeavor *ex officio* to obtain all documents which militate against the validity of the marriage. For it is a matter affecting the public welfare to annul such invalid marriages.[5] 4° We have seen that in causes not matrimonial the defendant cannot, as a rule, be compelled to produce an instrument which militates against himself. The case is different in matrimonial causes of nullity. Because in these causes not merely the interests of the litigants are involved, but also those of the marriage bond. Hence both the defendant and the plaintiff, and every one else, can be compelled by the judge, at all times, to produce any document proving or disproving the alleged impediment.[6]

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[1] Santi, l. c. n. 15.

[2] De Angelis, l. c. p. 110.

[3] S. C. de P. F. Instr. cit. §§ 18, 30.

[4] Card. Kutschker, l. c. vol. v. p. 876.

[5] Ib. p. 875.

[6] Kutschker, l. c. p. 876.

§ 4. *On Weakening or Overthrowing the Force of Instruments, also in Matrimonial Causes of Nullity.*

589. Instruments, both public and private, like all other proofs, though apparently vested with all that would make them worthy of belief, may yet in reality be either in whole or in part devoid of truth. Once this is shown, their force falls to the ground. It is therefore always allowed to attack or impugn instruments, public and private, just as it is lawful to attack witnesses and other proofs. For even a public instrument, whose genuineness is not questioned, is merely presumed to state the truth until the contrary is shown.

590. Q. In how many ways can instruments, both public and private, be attacked and overthrown, also in matrimonial causes of nullity?

A. Chiefly in two ways, namely, (*a*) as not genuine, that is, as not written by the one whose signatures they bear, and as being therefore forged; (*b*) as containing falsehoods.

591. 1° *The genuineness* of a paper may be questioned either in whole or merely in part. An instrument may be attacked as wholly forged (*a*) chiefly because, if there is question of a public instrument, it is not drawn up with the prescribed formalities, or lacks the seal of the public official by whom it is supposed to have been drawn up, or does not state the day, month, and year; (*b*) because the handwriting in the body of the instrument is different from that of the signature at the end. Again, an instrument, both public and private, may be attacked as forged only in part, because it has erasures, cancellations, or interpolations, showing that, while the signature may be genuine, the body of the paper has been altered or tampered with by other parties. In all cases where the genuineness of an instrument, public or private, is attacked, the burden of proving that it is really

genuine devolves, not upon the impugner, but upon the producer of the instrument or writing.[1]

592. The genuineness of instruments, public and private, is proved by comparing the paper in dispute with other papers acknowledged to have been written by the same person who is claimed to be the writer of the disputed one. This comparison of handwriting should be made by experts. However, as Santi[2] well remarks, this comparison of handwritings constitutes at the present day merely a half proof, owing to the great facility of imitating handwritings.

593. Where comparison of handwritings is impossible, v.g., where there is no other specimen of the handwriting of the supposed writer of the disputed paper, the genuineness may be established by two or more unexceptionable witnesses who testify to the fact of its having been really written by the signer whose name is affixed to it, and also to its contents.[3] But even this proof is unreliable. A public instrument may also be proved to be genuine by the testimony of the public official who signed it, supposing of course that he still lives, so as to be able to testify to the genuineness.[4]

594. 2° *The truth of the contents or statements* of an instrument, public or private, is a distinct question from that of its genuineness. A paper may be admittedly genuine and yet contain false statements. For all men, and even public officials, may commit mistakes or even be guilty of falsehoods. However, in the case of public instruments, the presumption is that, if genuine, they state the truth. For it is not presumed that the public officials from whom they emanate are guilty of falsehood or error. Hence the burden of proving that a public instrument contains falsehoods or errors falls upon the impugner.

595. The question, therefore, arises: How is it proven

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[1] München, vol. i. p. 167.

[2] L. c. n. 24.

[3] Santi, l. 2, t. 22, n. 24.

[4] München, l. c. p. 167.

that what is stated in an instrument, public or private, is false? We answer: Generally speaking, by witnesses.[1] These witnesses are of three kinds: 1° Those who signed the instrument; 2° Those who did not sign, but yet were present when it was written and signed; 3° Those who neither signed it nor were present at its execution, but who nevertheless have heard about it. Now if witnesses of the first kind swear that the contents of the paper are not true, the instrument loses all weight. If two or more unexceptionable witnesses of the second kind swear that they were present, and that the instrument is false, the latter loses its force. Finally, witnesses of the third kind may sometimes also give testimony which either renders the statements in the instrument suspected or shows them to be false.[2]

596. Q. By whom can the genuineness of instruments, when attacked, be proved in matrimonial causes of nullity?

A. The genuineness of instruments which militate against the validity of a marriage already contracted cannot be proved by the depositions of the married couple, or by the testimony of those persons who are to be regarded as suspected or as incompetent witnesses.[3] The reason is the same as that which makes the deposition or testimony of these parties suspected, namely, suspected collusion against the validity of a marriage which has become irksome.

597. We say, *which militate against the validity of the marriage;* for, just as the deposition or confession of the married couple which is *in favor of the validity* of the contracted marriage may constitute in some cases full proof, and in others a presumption,[4] so also may the genuineness of instruments which are *in favor* of the marriage sometimes be fully proved by the depositions of the spouses.

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[1] Cap. 6, 10, de fid. instr. (ii. 22).

[2] Santi, l. c. n. 23.

[3] Instr. Austr. § 168.

[4] Ib. § 149.

ART. V.

PRESUMPTIONS.

598. The next kind of proofs, though imperfect and indirect, are presumptions. They are frequently used in matrimonial causes, as we shall see. We shall briefly explain the nature, weight, and application of presumptions, especially in marriage causes, involving the validity of a marriage already contracted.

599. Q. What are presumptions?

A. A presumption is a reasonable conjecture or inference based upon signs or indications which usually lead near the truth.[1] We say, *a conjecture or inference*. Hence a presumption is not a *direct*, but merely an *indirect* proof. In other words, it is the deducing of a fact which is not perceived or known from another fact which is seen and known with certainty. Thus if I see Titius go into a beer saloon, I can reasonably infer that he drank beer in it. Here the fact of Titius' going into the saloon is seen by me. The other fact—the drinking of beer—is not seen by me, but is yet reasonably inferred by me from the fact of his going into the saloon.

600. It will also be seen that the fact or facts from which the inference is drawn and upon which the presumption is based must in judicial procedures, also in matrimonial causes, be *canonically proved* to exist.[2] Otherwise the inference or conjecture would be destitute of foundation. The burden of proving this fact naturally devolves upon the party which makes use of the presumption as a proof. We also say in the definition *reasonable*. By this we mean that the fact from which the inference is drawn should have a probable connection with the fact which is inferred from it,

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[1] Our Elements, vol. ii. n. 874, 875.

[2] Schulte, Eheproc. p. 153.

Otherwise the inference would be unjustifiable and unreasonable.

601. Q. How many kinds of presumption are there?

A. 1° Presumptions are divided into (*a*) *legal*, or those where the law itself draws the inference from certain facts or contingencies; (*b*) *personal*, or those where the inference or conjecture is not expressed, or given, or drawn by the law itself, but where it is left to the prudence and discretion of a person or judge to draw the inference.[1]

2° Personal presumptions (*praesumptiones hominis*) are subdivided into 1st, weak or rash, 2d, reasonable or grave, 3d, violent or very strong, according as the inference has (*a*) a weak, (*b*) a strong, (*c*) or a violent basis.

3° Legal presumptions (*praesumptiones juris*) are also subdivided (*a*) into *ordinary* presumptions of law (*praesumptiones juris tantum*)—namely, those which hold a thing to be true, not absolutely, but only till the contrary is proved, and therefore admit of proof to the contrary; (*b*) into *absolute* presumptions (*praesumptiones juris et de jure*), or those which hold a fact to be absolutely true, in such a manner as not to admit, generally speaking, of proof to the contrary.[2]

602. Q. What is the force or weight of presumptions, both personal and legal?

A. 1° A personal presumption (*presumptio hominis*), when light and weak, proves nothing at all; when serious and grave, it stands either alone, and then it may constitute a half proof, or it is corroborated by other proofs, v.g., by public report, and then it may constitute a minor grade of full proof sufficient in civil causes of minor importance; when violent or very strong, it may of itself constitute full proof in civil causes which are not of too great importance. In all these cases, however, the proof is only a conditional one. In other words, these presumptions constitute proof only so long as the contrary is not proved. Hence they always admit of proof to the contrary. In fact, all inferences drawn by men, even though wise and prudent, may be mistaken. They constitute, after all, practically speaking, nothing more than a probability, greater or lesser, according to circumstances.

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[1] De Angelis, l. 2, t. 23, pp. 116, 117.

[2] Our Elements, vol. ii. n. 877.

603. 2° Ordinary presumptions of law (*praesumptio juris tantum*) constitute full proof until the contrary is proved. Hence they admit of proof to the contrary, but at the same time throw the burden of proving the contrary upon the opponent against whom they militate. Thus it will be seen that these presumptions create only a *conditional* certainty, that is, they create a certainty only on condition that the contrary is not proved. For even the inferences drawn by the law are, after all, only inferences, and may therefore be wrong or mistaken. Consequently these legal inferences or presumptions produce, practically speaking, a probability, not a moral certainty. Thus it is a simple, though a very strong, presumption of law that a person is baptized who has been born of Catholic parents and brought up among Christians.[1] Yet this presumption may evidently be wrong in some cases.

604. 3° An absolute presumption of law (*praesumptio juris et de jure*) constitutes, of itself alone, full proof, in the completest sense of the word, and consequently in such a manner as to exclude, generally speaking, all proof to the contrary.

605. Q. What are some of the *praesumptiones juris et de jure* with regard to marriages or matrimonial causes?

A. We shall give only a few examples. I. The law of the Church, down to the year 1892, presumed that if a man and a woman, in places where the Tridentine decree *Tametsi*[2] did not obtain, had promised to marry each other and then had exercised the *copula carnalis* with each other, they had thereby fully consented *de praesenti* to the marriage, and that consequently they were, by that very fact, validly married. The law presumed this absolutely, and therefore did not admit of any proof to the contrary. As will be seen in the case, there may have been no *express* or even tacit matrimonial consent *de praesenti* or *affectus maritalis*. Yet the law presumed or inferred, from the sexual intercourse which took place after the betrothment, a full conjugal consent *de praesenti*, and did not allow of any proof showing the absence of conjugal consent, or of *affectus maritalis*.[1] In other words, the law inferred absolutely from the *copula*, in the case, that the spouses did not intend to act as fornicators, but as husband and wife.[2]

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[1] In the cap. 3 de presb. non bapt., Pope Innocent III. says: "Et certe de illo, qui natus de Christianis parentibus, et inter Christianos est fideliter conversatus, tam violenter praesumitur, quod fuerit baptizatus," etc.

[2] Conc. Trid. sess. 24, cap. 1 de Ref. Matr.

606. Of course, this presumption *juris et de jure* held only *in foro externo et judiciali*, and not *in foro interno*. Moreover, from what has been said, it follows that even *in foro externo* the presumption in the case did not hold unless two facts were canonically proved, namely, (*a*) the betrothal (*sponsalia*), and (*b*) the subsequent *copula carnalis*, which must have been not merely inchoate or tentative,[3] but *consummate* in the full sense of the word. For, as we have seen, in all presumptions the facts from which the inferences are drawn must first be fully established. Otherwise no inference can be drawn from them.

607. We have said, *down to the year* 1892. For, as we have noted, on the 15th of February, 1892, Pope Leo XIII. issued a decree in which he introduced a radical change in the law of the Church on this head. In this decree the Pope enacts that for the future, in places where the Tridentine decree *Tametsi* does not obtain, the *copula carnalis* following upon betrothal shall not be construed by absolute inference or presumption of law as a valid marriage *in foro externo*.[4]

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[1] Cap. *Is qui* 30 de Spons. et Matr. (iv. 1); cap. 6 de Condit. app. (iv. 5).

[2] S. C. de P. F., Instr. de Conjugiis, 1821, given in our Notes, p. 439 sq.

[3] Cap. 32 de Spons. et Matr.

[4] *Supra*, n. 347 sq.

608. II. Again, whoever contracts a marriage under certain stipulations—v.g., "I hereby marry thee if thou wilt give me one hundred dollars"—is presumed, and that by presumption *juris et de jure*, to have given up this condition or stipulation, and to have given his full marital consent *de praesenti*, if he consummates the marriage before the condition is fulfilled.[1] In other words, from the consummation of the marriage, or from the *copula* which takes place prior to the fulfilment of the stipulation, the law infers absolutely that the condition has been withdrawn and the full marital consent given, and that consequently the marriage has passed from a conditional to an absolute one. Of course, this presumption holds only *in foro externo*, and even there only after the consummation of the marriage prior to the fulfilment of the condition is proved.

609. III. The following is another presumption: When a person has invalidly contracted marriage owing to grave fear or violence, but afterwards, being freed altogether from fear or violence, either voluntarily exercises the *copula carnalis*, or, even without such *copula*, lives together with the other spouse voluntarily for a year and a half,[2] the law infers absolutely from such *copula*, or from such dwelling together, that the marital consent has been fully and freely given, and that the marriage has been thus rendered valid.[3] This presumption *juris et de jure*, like all presumptions, holds only *in foro externo*, and even there only after the free *copula* or cohabitation has been clearly established.

610. IV. Again, where a person has contracted marriage invalidly *through error*, but afterwards, having discovered his error, either exercises the *copula*, or, even without the *copula*, continues to live with the other spouse for a year and a half, or, according to the Instr. Austr. § 116, for six months,

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[1] Cap. 3, 6, de Cond. app. (iv. 5); Instr. Austr. § 54.

[2] The Instr. Austr. §§ 93, 116, requires only *six months*. The S. C. de P. F. Instr. cit. § 36 does not specify the time, but says simply *per longum tempus*.

[3] Cap. 21 de Spons. et Matr. (iv. 1); De Angelis, l. 2, t. 23, pp. 118, 119.

the law infers absolutely from such *copula* or cohabitation that the marital consent has been fully and knowingly given, and that the marriage is, in consequence, valid.

ART. VI.

THE OATH AS A PROOF.

611. The oath, as here understood, is the calling upon God Himself as a witness of the truth of an assertion or statement. The oath is therefore a solemn, sacred, or religious act. When we take an oath, we solemnly call upon God, the Creator of all that exists, the just avenger and punisher of all untruth and wrong, the seer of the inmost secrets of our hearts, to be present as the witness of the truth of what we say or affirm. Surely, then, this solemn and sacred act is calculated to exert a powerful influence upon our conscience and mind, and to deter us from telling an untruth.[1] Hence, in matrimonial causes of nullity, not only the spouses themselves, but also all the witnesses, are obliged to depose under oath. Otherwise their testimony is of no value whatever. Thus it will be seen that the oath adds great weight to the testimony, and is therefore a necessary part of the proofs in matrimonial as in other causes.[2]

612. Q. What oaths are taken in matrimonial causes of nullity?

A. 1° The officials of the matrimonial court, namely, the moderator, the official defender of the marriage, and the secretary, are all obliged to take the oath to discharge the duties of their respective offices faithfully and conscientiously (*juramentum de munere fideliter adimplendo*).[3]

2° The oath to tell the truth, the whole truth, and nothing but the truth (*juramentum veritatis dicendae*) is necessarily to be taken by all who depose or testify; that is, by the spouses, by the witnesses, etc.[1]

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[1] Schulte, Eheproc. p. 185. [2] Our Elements, vol. ii. n. 1496. [3] Ib. n. 1422.

3° In case the judge or the auditor deems it necessary, the foregoing parties, namely, the spouses and the witnesses, may also be obliged to swear that they will not divulge their testimony or deposition to others[2] (*juramentum de secreto servando*).

613. The above are the only oaths taken in matrimonial causes of nullity. Hence the *juramentum litis decisorium* is absolutely excluded from these causes.[3]

The law of the Church imposes severe penalties upon all persons, ecclesiastics or laics, who swear to a falsehood.[4]

As to the weight of the statements made by the spouses under oath, see above, n. 474 sq. (confession of spouses).

ART. VII.

NOTORIETY AS A PROOF.

614. The notoriety of a fact is of itself, theoretically speaking, full and complete proof. In other words, what is notorious as a fact needs no other proof besides its notoriety. Consequently when a thing or fact is notorious, in the legal and full sense, it is not necessary to prove it by a trial or process. For a trial is nothing else than the legitimate proving of what is doubtful. Now what is notorious is not doubtful. Therefore, theoretically speaking, when a crime or fact is notorious, a judicial final sentence can be given, with regard to it, without any previous trial or process.

615. We say, *theoretically speaking*. For, as we show in

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[1] S. C. de P. F. Instr. cit. § 12. [2] Ib.

[3] Cf. Card. Kutschker, l. c. vol. v. pp. 850, 855.

[4] Cap. 10, 12, de jurejur. (ii. 24).

our Elements of Ecclesiastical Law,[1] and in our New Procedure,[2] the case is quite different, practically speaking, owing to the difficulty of determining when a fact is really notorious in the legal sense of the term. Hence, practically speaking, no crime, however notorious, should be punished without a previous trial.

616. When we come to apply notoriety as a proof to matrimonial causes of nullity, the above principles acquire much greater force. The interests involved in marriage are very great and far-reaching. Upon its stability and inviolability depends the welfare of families; upon the welfare of the family depends the welfare of the State or of civil society, which springs from and is based upon the family. Hence the stability of the marriage is to be protected in every legal manner possible. Consequently a marriage, once contracted, is to be held as valid until its invalidity is *fully and clearly proved*, as we have seen.

617. Consequently the law of the Church does not consider notoriety of itself a sufficiently full, complete, and perfect proof of the invalidity of a marriage already contracted. In other words, no matter how notorious the diriment impediment may be, it must be proved in a legitimate manner, that is, by a trial or judicial process.[3] Hence a marriage contracted can never be pronounced invalid by the ecclesiastical judge, except upon a trial or process[4] conducted in the manner laid down by Pope Benedict XIV., Const. *Dei miseratione*, and by the S. C. de P. F. Instr. *Causae Matrimoniales*,[5] save in the cases specified in the decree of June 3, 1889. Of course, the proof of the existence of the impediment and of the consequent invalidity of the marriage is much easier where the impediment is notorious than in the case where it is not notorious.

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[1] N. 1263 sq.

[2] N. 105 sq.

[3] Cap. 3 de divort. (iv. 19).

[4] S. C. C. *Sonorensis* in Americ. Sept., 26 Aug. 1848 ; Feije, de Imp. n. 591 sq.

[5] Feije, de Imp. n. 586.

618. We have said, *save in the cases specified.* For, on June 3, 1889, as we shall see later on (n. 803), the S. C. S. O. decreed that where it was *clearly evident and perfectly certain* that a certain impediment existed, the marriage could be pronounced invalid by the bishop without a regular trial, as prescribed in the Const. *Dei miseratione* (with us, *Causae Matrimoniales*), though not without having previously heard the *defensor matrimonii.*

619. However, while notoriety is not full canonical proof, and therefore does not of itself empower the bishop, without a previous matrimonial trial, to annul a marriage already contracted, it nevertheless creates a very grave presumption against the marriage, and therefore authorizes the bishop to order the fiscal procurator to proceed *ex officio* against the marriage, and to make the juridical accusation or petition for its annulment.[1]

620. Again, the notoriety of an impediment is of itself a sufficient proof *to hinder a marriage from being contracted.* Finally, notoriety is of itself a full and canonical proof of the fact (*a*) that a marriage has been contracted, and (*b*) that it is valid. In other words, while notoriety is not full proof *against* the validity of a marriage, it is full proof *for* its validity. When it is notorious, as is generally the case in regard to all marriages, (*a*) that a man and a woman are married, (*b*) and that validly, this notoriety is full proof of both these facts.[2]

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[1] Cap. 3 de divort.

[2] Schulte, Eheproc. p. 155.

PART IV.

THE TRIAL OR PROCESS IN MATRIMONIAL CAUSES OF NULLITY.

CHAPTER I.

GENERAL OUTLINE AND CHARACTERISTICS OF THE TRIAL.

621. WE come now to the process itself, or to the manner in which these matrimonial causes are heard and decided. We speak here only of those causes in which the validity of a marriage already contracted is involved. In other words, we shall confine ourselves to those causes where it is claimed that a marriage already contracted is invalid by reason of a diriment impediment existing at the time the marriage was contracted.

622. The object of the trial in these causes is to find out whether the asserted impediment exists or not, and whether, in consequence, the marriage is valid or not. In order to do this, the judge should naturally hear the parties themselves, that is, the spouses, and all those other persons who have a knowledge of the facts relating to the asserted impediment, and should also receive and, at times, even seek all other kinds of proof which may throw light on the matter.

623. This hearing of the parties, witnesses, etc., in order to be successful and not a mere waste of time, should be conducted with order and method. This order and method

of giving to all parties an equal, full, and impartial hearing, which is called the process or trial, is not left to the will of the judge or to the fancy of the parties, but is fixed and determined by the law itself. The process or trial, therefore, in matrimonial causes of nullity, is nothing else than the hearing of all the parties and of their witnesses, conducted in the manner prescribed by law, namely, by the Const. *Dei miseratione* of Pope Benedict XIV. and by the Instr. *Causae Matrimoniales* of the S. C. de P. F.

624. Q. What are the general characteristics of the trial in matrimonial causes of nullity?

A. 1° The proceedings, that is, the juridical hearing of the parties, witnesses, etc., are conducted in a *summary manner*. In other words, the *substantial* formalities of a formal trial are to be observed, but the non-essential formalities can be omitted.

2° The substantial parts or formalities are chiefly as follows: (*a*) the juridical, though informal, petition for the annulment of the marriage; (*b*) the citation of the petitioner, if he be a third party, and of the husband and wife, as also of the *defensor matrimonii*, to appear for the trial; (*c*) an informal, though juridical, joining of issue (*litis contestatio, matrimonii contestatio*); (*d*) the canonical proofs submitted on both sides; (*e*) the publication of the entire proceedings and proofs to both parties; (*f*) the final summing up by both parties or their advocates; (*g*) the final decision by the judge or auditor.

625. *Outline of the trial in matrimonial causes of nullity.*—In order to enable the reader to understand the above substantial parts of the process more fully, we shall here give a brief synopsis or outline of the whole trial. The first step is the petition for the annulment of the marriage. In other words, the party wishing to have the marriage declared invalid or null must first of all present to the bishop or judge a juridical, though informal, petition or demand asking that

the marriage be declared invalid on account of an alleged diriment impediment. On receipt of this demand the judge should carefully, though extrajudicially, examine whether the petition is well founded, that is, whether the asserted impediment is *prima facie* capable of being canonically proved. For this purpose he should examine the petitioner, the spouses, and others who may know of the facts, on all the circumstances of the case. If he finds that the petition is based upon frivolous grounds only, he should simply reject it. But if he finds that there are *prima facie* solid proofs for the existence of the impediment, he should issue the citation to the parties, that is, to the petitioner or plaintiff, to the defendant spouse or spouses, and to the official defender of the marriage, to appear for trial.

626. On the day appointed in the citation the first step is the *contestatio matrimonii*, which takes place in the following manner: The petitioner for the annulment, or the plaintiff, whether he be one of the spouses or a third party, is first examined, under oath, on all the points and details of his or her demand for the annulment. After this, the defendant,—that is, either one of the spouses, in case the other is the plaintiff, or both spouses,—is carefully examined, under oath, on the whole case. To enable defendants to answer properly, the petition for the annulment is communicated to them. By this means, that is, by the sworn statements of both sides, the issue is clearly and fully brought out, determined, and joined.

627. Thereupon the plaintiff or the petitioner for the annulment produces his proofs, v.g., witnesses, documents, etc., which go to show the existence of the alleged impediment. Afterwards the defendant spouse or the defender *ex officio* of the marriage produces before the judge whatever proofs he or she may possess to show that the asserted impediment does not exist, and that the marriage is therefore valid.

628. When both sides rest, or have presented all their proofs, the entire proceedings, records, proofs submitted, are communicated to them; that is, the entire record, etc., is submitted to their inspection, or a copy is given them.

629. Next comes the summing up in law and in fact by both sides. After which the final sentence is pronounced.

We shall now describe the various stages of the matrimonial process thus outlined.

CHAPTER II.

PETITION FOR THE ANNULMENT OF THE MARRIAGE.

(*Accusatio matrimonii.*)

630. THE first step or stage of the trial in matrimonial causes of nullity is the petition for the annulment of the marriage contracted. We shall here briefly discuss the nature, form, contents, etc., of this petition, which is, so to say, the corner-stone of the entire process.

ART. I.

NATURE, CONTENTS, AND NECESSITY OF THE PETITION.

631. Q. What is meant by the petition for the annulment of the marriage?

A. It is a short and clear statement setting forth the impediment which it is claimed renders the marriage contracted invalid, and requesting that the marriage be accordingly declared invalid. It can be made either orally or in writing. If it be made orally, it must be put in writing by the secretary of the court. Hence it will be seen that the petition must always be put in writing, and that either by the person making it or by the secretary of the court. Consequently this petition, as put in writing, is called *libellus accusationis matrimonii*, or written petition for the annulment of the marriage, or simply, written accusation of the marriage.

632. The words "accusation of the marriage"—*accusatio matrimonii, libellus accusatorius matrimonii*—are not used here as though either of the spouses is accused of crime in connection with the marriage, but as signifying that *the marriage contracted is being accused of invalidity*, or is accused as being invalid. In fact, that is what the petition for the annulment does. It charges the marriage with being invalid, and asks, in consequence, that it be declared invalid.

633. From this it will be seen that the active subject of the accusation of the marriage, or of the demand for its annulment, is the accuser, or the petitioner for the annulment; the passive subject, the defendant, namely, the husband or wife whose marriage is impugned or attacked; the object, the marriage itself whose annulment is demanded.

634. Q. What should be the tenor or contents of the petition for the annulment of the marriage?

A. The very nature of the petition or accusation indicates the answer. The petition asks that the marriage contracted be declared invalid because of a diriment impediment. Hence it should set forth (*a*) that the marriage in question was really contracted between so and so at such a time, at such a place, and before such a parish priest; (*b*) that at the time of its celebration a diriment impediment stood in its way. This impediment should be fully described. Thus if it is claimed that the impediment of fear and violence existed at the time of the celebration of the marriage, the acts of violence, v.g., the threats, the corporal punishments, etc., etc., should be fully described, and the proofs to be brought in support of these should be indicated, so that the judge may be able to know whether the petition is based upon good grounds. (*c*) Finally, it should clearly and distinctly contain the demand for the annulment. The bill of accusation of the marriage is to be signed by the petitioner or plaintiff.

635. What has been said as to the contents of the accu-

sation is thus laid down by the S. C. de P. F. Instr. *Causae Matrimoniales* 1884, § 5: "In ea (accusatione), praeter accuratam facti expositionem, enarranda erunt omnia adjuncta necessaria, et omnia indicia concurrentia; indicandi et nominandi sunt testes de re instructi, ut hoc modo fundamenta accusationis cognoscantur, et via tribunali sternatur veritati detegendae."

636. Lastly, the petition should also show that the person making it has the right to do so and has not lost that right. From all this it will be seen that the accusation of the marriage should be drawn up with great care. As a rule, it will have to be written out for the petitioner, either by the parish priest, or by an ecclesiastical advocate, or by the bishop's secretary. For the petition is usually made by lay persons, namely, by one of the married couple, who are little versed in such matters.

ART. II.

BEFORE WHOM AND HOW THE PETITION IS MADE.

637. Q. Before whom and in what manner is the petition or accusation of the marriage to be made?

A. 1° The Instr. S. C. de P. F. thus answers, under article 4: "Ista accusatio coram legitimo ordinario ecclesiastico fieri debet." In other words, it is to be made before the bishop or ordinary who has jurisdiction or competence in the case, or to the matrimonial judge, moderator, or auditor appointed by him. Now we have seen that, as a rule, the ordinary of the place where the husband lives has competence. Hence, if the petition is presented to any ordinary other than the competent one, it should be rejected, or sent to the competent judge.

638. 2° The manner in which the petition or accusation is to be made to the competent ordinary is thus described by the above instruction of the S. C. de P. F., under article 4:

"Ista accusatio . . . fieri debet *in scriptis:* si oretenus facta fuerit, judicialis reddenda erit juxta regulas communi jure traditas, scilicet efficiendo ut accusator eam repetat coram tribunali, et a cancellario in actis redigatur."[1] Accordingly the accusation of the marriage, or the petition for its annulment, is to be always *put in writing.* It may be and is usually drawn up for the accuser or petitioner by an ecclesiastical advocate. But it must always be signed by the accuser himself.[2] It may be presented to the bishop by the accuser in person, or through the parish priest, or the ecclesiastical advocate. But where it is presented by the priest or advocate, the petitioner must also, in every case, present himself before the ordinary or the latter's matrimonial tribunal, and orally explain the full circumstances of the case.[3]

639. Consequently when a petitioner presents the written accusation to the ordinary through an advocate, and does not himself appear before the ordinary for a preliminary examination,[4] his accusation is not, as a rule, to be accepted as an accusation in the proper sense of the term. We say, *as an accusation in the proper sense;* for the accusation may be treated simply as a *denunciation*, or as information which may lead the ordinary to make further inquiries and to proceed, if need be, *ex officio* against the marriage.[5]

640. We say also, *as a rule;* because, where it is known that the complainant or petitioner is a good, reliable, and trustworthy person, and where consequently there is no danger of fraud or calumny, the bishop or the moderator of the matrimonial court may admit the accusation or petition for the annulment of the marriage, and proceed to the trial, without requiring the plaintiff to appear before him for a preliminary extrajudicial hearing. Of course, as we shall

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[1] Cf. Instr. Austr. § 126.

[2] Card. Kutschker, l. c. vol. v. p. 727.

[3] Instr. Austr. § 128.

[4] Cap. 2 Qui Matr. acc.; Kutschker, l. c. vol. v. p. 727.

[5] Instr. Austr. § 129.

see, the plaintiff must, in this as in all other cases, appear before the judge during the process itself and, under oath, give his statement of the case.[1]

641. When the accuser of the marriage or the petitioner for its annulment does not know how to draw up the writing embodying the petition, and has no advocate or other person to do it for him, he should have it put in writing by the secretary of the matrimonial court in the following manner: He should appear in person before the matrimonial tribunal, that is, before the judge and the secretary; he should then first tell the whole case orally. The secretary should then write out the regular accusation, in the manner described, from the data given by the accuser. This accusation, thus written carefully by the secretary, should be read for the accuser, and should then be signed by him.[2]

642. It will be seen, therefore, that in either case, that is, whether the accusation is presented in writing or whether, having been made orally before the matrimonial court, it is put in writing by the secretary, the petitioner or accuser must always appear in person before the ordinary or his matrimonial tribunal for a preliminary examination, and give a full and detailed oral account of the whole case. On this occasion the bishop or his moderator of the marriage court should endeavor to obtain, by prudent questions, a full knowledge of the asserted impediment, and of all the circumstances connected with it, as also of the witnesses informed on the matter, and of all other available evidence. If he finds on this occasion that the asserted impediment cannot be proved, he should reject the petition, or at least defer further proceedings until a better *prima facie* case is made out.

643. Q. Is it always necessary that a juridical accusation of the marriage or petition for its annulment should be made?

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[1] Gasparri, l. c. n. 1190.

[2] Card. Kutschker, l. c. p. 731.

A. The Instruction of the S. C. de P. F. § 3 answers affirmatively as follows: "Ut in tribunali ecclesiastico causa aliqua matrimonialis tractanda suscipiatur, necesse est ut contra matrimonium regularis et juridica accusatio praecesserit." Consequently the *libellus accusatorius matrimonii*, that is, the juridical petition for its annulment, is always required no matter whether the annulment is demanded by one of the spouses, or by a third person, or by the matrimonial court *ex officio.* In the latter case, the petition or accusation should be drawn up and presented by the *procurator fiscalis*, or by some other official appointed by the bishop or the matrimonial court.

644. The reason is that the juridical petition for the annulment is in marriage causes what the *libellus accusatorius criminalis* is in criminal and disciplinary causes, and what the *libellus civilis* (*libellus actionalis*, *libellus conventionalis*) is in civil causes not matrimonial. Consequently the *libellus* or *accusatio matrimonii* is the corner-stone and foundation of the whole marriage process.

645. Q. Can everybody petition for the annulment of a marriage already contracted?

A. We must distinguish between a regular juridical accusation of the marriage, or petition for its annulment, and a *mere denunciation.* The latter consists simply in giving the ordinary information in regard to an impediment which renders a marriage contracted null. This can of course be done by everybody having a knowledge of the impediment. But the former, namely, the regular juridical petition for the annulment, can be made by those persons only who are qualified by the law of the Church to do so. Who these persons are we have already explained. Accordingly the Instruction of the S. C. de P. F. says, under article 3: "Quae (accusatio matrimonii) nunquam erit admittenda, nisi proficiscatur a persona vel personis, quae communi jure habiles ad accusandum habentur. Etenim in quibusdam im-

pedimentis ipsi conjuges tantum uti accusatores admittuntur, in aliis qui sunt iisdem sanguine propinqui, vel etiam quilibet de populo; ac tandem ex officio etiam inquisitio fieri, et quandoque debet, quando praesertim contra alicujus matrimonii validitatem simplex denuntiatio facta fuerit, aut fama fundamentum veritatis praeseferens de alicujus impedimenti existentia divulgata sit."

646. Q. Is it necessary to produce the proofs together with the petition or accusation?

A. The petition need not be accompanied by any proofs. It is sufficient for the petitioner to *indicate* the proofs which he will produce subsequently, that is, after the citation of the defendant and the *contestatio matrimonii*.[1] Thus the Instr. Austr., under article 126, says of the contents of the *libellus*: "Probationes quas praesto sibi esse autumat (actor) *indicandae* sunt."

647. Q. Can the proofs be sometimes juridically produced before the matrimonial court, simultaneously with the juridical accusation, and prior to the *matrimonii contestatio?*

A. Yes, in two cases. *First, documents*, such as letters, marriage certificates, etc., etc., can be presented at any time, and therefore can be annexed to or enclosed in the *libellus*, or petition for the annulment. The defendant spouse is thereupon obliged to admit or reject them as genuine, in his or her examination. *Second*, as in other causes, so also in matrimonial, when there is danger that the proofs will be lost by delay, v.g., where the witnesses are old or infirm, and consequently may die soon, recourse can be had at any time to the examination of witnesses *ad perpetuam rei memoriam*, as described in our New Procedure, n. 264 sq.

648. Q. Is it necessary, already in the petition, to refute possible objections or exceptions, which may be made by the defendant spouse or by the *defensor matrimonii?*

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[1] Schulte, Eheproc. p. 116.

A. Not as a rule. We say, *as a rule*. The exceptions are: 1° Where an objection has to be considered *ex officio* by the judge, v.g., the objection of incompetence of the court in the case; 2° Where it appears from the petition itself that an objection may lie; for instance, where a person or spouse petitions for the annulment of the marriage because of *force and fear*, and yet admits that the marriage has been contracted over six months ago or that the *copula* has taken place. In this case the petition ought to anticipate the answer to the objection, and say, for instance, that the *copula* was involuntary, or that the cohabitation was not free.[1]

ART. III.

WHEN THE BISHOP CAN AND SHOULD PROCEED "EX OFFICIO."

649. Q. When can and should the bishop or the matrimonial court proceed *ex officio* against a marriage already contracted?

A. 1° When there is question of the invalidity of a marriage owing to an impediment *juris privati*, the right to demand the annulment belongs *exclusively* to the married couple, as we have seen. Hence, in the case of these impediments, the bishop or the matrimonial court cannot proceed *ex officio* against the marriage.

650. 2° But when there is question of impediments which are *juris publici*, the case is entirely different. For here not only the married couple, but *any one* else who has a knowledge of the impediment and who is not presumed to act maliciously, has the right to petition juridically for the annulment of the marriage. Consequently, in these cases, the ordinary or his matrimonial court can undoubt-

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[1] Schulte, Eheproc. p. 116.

edly proceed *ex officio* against the marriage. The reason is that the impediments *juris publici* have been established for the general welfare of society, and not merely for the individual good of the married couple. Their object is to preserve and protect the sanctity and dignity of marriage. Hence it is in the interests of society that marriages contracted with such impediments should be either healed by dispensation or declared invalid and dissolved.

651. 3° Hence the bishop undoubtedly *can* proceed *ex officio* against all marriages which are invalid because of an impediment *juris publici.* But is he always *obliged* to do so? First of all, it follows from the very nature of the case that the annulment is usually demanded either by the married couple themselves or by their parents and relatives, whose interest and family honor give them a special right to petition for the annulment, or by other persons. Of course, where the demand for the annulment is made by any of these parties, the bishop need not proceed *ex officio.*

652. 4° But should the bishop always proceed *ex officio* if none of these parties makes the juridical accusation? Yes, generally speaking, provided, however, there are good and solid reasons for the procedure. We say *yes.* The reason is that parties living together in such invalid marriages commit sin, give public scandal, and degrade marriage itself. Now it is the right and duty of the ordinary to repress sin and scandal, and to uphold, in every legal way possible, the dignity and sanctity of marriage.

653. We say, secondly, *provided there are good reasons,* etc.; for while, on the one hand, the dignity and sanctity of the marriage require that invalid marriages should either be made valid by dispensation or entirely dissolved, the stability and inviolability of marriage demand, on the other hand, that a marriage once contracted in an apparently valid manner should not be impugned, save when there are *prima facie* solid proofs of its invalidity, that is, of the

asserted diriment impediment rendering it invalid. These *prima facie* solid proofs are usually brought to the notice of the bishop either by trustworthy persons who know of the impediment and inform him of it, but who do not wish to make a juridical accusation against the marriage, or by public report having a good foundation. Here it is well to observe that the bishop is always bound to protect a marriage against all attacks which are not based upon good and solid proofs.

654. We say, finally, *generally speaking;* for, even under the suppositions mentioned, it may be sometimes prudent for the bishop, especially in this country, not to proceed *ex officio* against a marriage. This might especially be the case if the married couple were either lukewarm or bad Catholics and would laugh at the laws of the Church or the decisions of ecclesiastical tribunals.

ART. IV.

IS THE PETITION REQUIRED IN NOTORIOUS CASES?

655. Q. Are the accusation of the marriage, and the trial, always necessary, even where the diriment impediment is notorious, before the ecclesiastical judge can declare a marriage already contracted invalid?

A. Yes, except in the cases given in the decree of June 3, 1889. For, as we have seen, notoriety is not of itself full proof of the impediment and consequent nullity of a marriage already contracted. Hence, even where the diriment impediment is notorious, the trial must precede the judicial declaration of its nullity.[1] Now the first essential step of the trial is the juridical accusation, or petition for the annulment of the marriage. Wherefore it is never allowed, even where the invalidity is notorious, for the married couple to annul by their own authority a marriage which has been contracted in due form, or is publicly regarded as a marriage, or has at least the semblance or figure of a true marriage, or is even doubtful as a marriage.[1] The annulment must, in all these cases, be pronounced by the ecclesiastical judge.[2] For, wherever the fact that a marriage has been contracted, and therefore exists, is undoubted, or is justly presumed from circumstances, such marriage is to be regarded as valid, *in foro externo*, until its invalidity is proved before, and juridically declared by, the competent ecclesiastical judge.

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[1] Feije, de Imp. n. 591 sq.

We have said, *except in the cases*, etc. For, as we shall see (n. 803), the S. C. S. O., on June 3, 1889, modified the rigor of the law on this head, and decreed that, in the case of certain impediments, where it was *evident* and *undoubted* that such an impediment existed, the bishop could declare a marriage to be null, without a previous trial, though not without having previously heard the *defensor matrimonii*.

ART. V.

PRACTICAL RULES FOR PARISH PRIESTS AND CONFESSORS RELATIVE TO THIS PETITION.

656. Q. Should the confessor or parish priest who may detect a diriment impediment always advise the married couple or others to petition for the annulment of the marriage in the matrimonial court?

A. When it is found, after a marriage has been contracted, that a diriment impediment stands in the way of its validity, great prudence and circumspection should be exercised by the parish priest or confessor, to whom, as a rule, the matter becomes known first. Different remedies or courses lie open, viz., (*a*) the juridical declaration of its invalidity ; (*b*) living together as brother and sister ; (*c*) rendering the marriage valid by a dispensation ; (*d*) leaving the parties in good faith. It will depend upon circumstances which of these courses is to be followed, and therefore recommended or enjoined by the parish priest or confessor.

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[1] Feije, l.c. n. 586.

[2] Cap. 3 de divort.; cap. 13 de rest. spol. (ii. 13).

657. We will suppose, *first*, that the impediment is publicly known, and therefore also known to both the husband and the wife. If the impediment, in the case, does not admit of a dispensation, v.g., where there is question of a prior marriage, nothing remains but to make the juridical petition for the annulment of the marriage, and begin the trial, and that even *ex officio* when the parties themselves fail to do so. Nay, even where the impediment, in the case, admits of a dispensation,—v.g., where there is question of the third or fourth degree of consanguinity,—the juridical annulment of the marriage is to be preferred to its being rendered valid by dispensation,[1] when the spouses do not lead good Christian lives, or are given to quarrelling and disagreements, and the marriage is an unhappy one, or when it is foreseen that a civil divorce will be obtained. Where, however, the impediment admits of a dispensation, the spouses should be urged, outside the cases just mentioned, to heal the marriage by a dispensation. But if they refuse to apply for the dispensation, nothing remains but to take steps for its juridical annulment.

658. We will suppose, *second*, that the impediment is known indeed to both the man and the wife, but is occult as to others.[2] If, in this case, the impediment does not admit of a dispensation, either because the dispensation cannot be given or is never given, the spouses may be allowed to

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[1] Especially when there are no children.

[2] When we say, *occult as to others*, we do not mean that it is not known to one or two persons, but that it is not known to five or ten persons. For we use the words *occult* and *public* in a juridical sense.

dwell together as brother and sister, if it can be done without danger of incontinence, which danger, however, exists nearly always. Hence, as a rule, recourse must be had, in the case, to the bishop's court for the juridical annulment of the marriage. But if the impediment admits of a dispensation, recourse may be had, indeed, to its juridical annulment, especially in the circumstances indicated above; otherwise the parties should be strongly urged, nay, obliged to render the marriage valid by a dispensation.

659. We will suppose, *third*, that the impediment is unknown to both the husband and the wife, and is also occult as to others. If, in the case, it is foreseen that the couple, if informed of the impediment, will do what the law of the Church prescribes, and that no great evils will follow, they should be prudently informed of it. After being thus informed, if the impediment does not admit of a dispensation, the couple should either apply for the annulment of their marriage, or, if there is no danger of incontinence,—which is but very rarely the case,—they can live together as brother and sister. But if the impediment admits of a dispensation, they should be urged to apply for it and thus render their marriage valid, except under the circumstances already indicated. If they refuse to seek for a dispensation, the only course left open is to begin judicial proceedings looking to the annulment of the marriage.

660. But where it cannot be hoped that the spouses, if informed of the impediment, will do what the law of the Church demands, or that the remedy, v.g., the juridical annulment of the marriage, will cause great trouble or serious injury, then they should be left in good faith, even though there is question of an impediment which is *juris naturæ*, v.g., impotency. Sometimes it will happen that one of the spouses can be prudently informed of the impediment, but not the other. In this case, if the impediment admits of a dispensation, a dispensation *in radice* should be obtained,

and the party should be informed and then renew the consent.[1]

661. Let us suppose, *fourth*, that the impediment is known to *one* of the spouses but not to the other, and is moreover occult as to other people. In this case, the impediment either admits of a dispensation or it does not. If it does not, the spouse who is aware of the impediment must necessarily communicate it to the other spouse, and the juridical annulment should be demanded, or the couple may live together as brother and sister, provided it can be done without incontinence, which, however, is very seldom the case.

662. Where the impediment admits of dispensation, the party knowing it should inform the other party, if it can be done without grave evils or serious troubles, and then the marriage should be rendered valid by a dispensation, save in the circumstances already stated. But if the spouse who is ignorant of the impediment cannot be informed of it without serious consequences, then a dispensation *in radice* should be obtained and executed as above stated.[2]

ART. VI.

PRELIMINARY INVESTIGATION CONSEQUENT ON THE PETITION.

663. When the juridical petition for the annulment, or the *accusatio matrimonii*, has been properly made,[3] as already shown, it becomes the duty of the ordinary or the moderator

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[1] Feije, de Imp. n. 598.

[2] Ib. n. 599.

[3] When the petition is presented in writing, the bishop, auditor, or secretary should write on it the day, month, and year of its presentation and the name of the person presenting it. This is to be done with regard to all documents or papers presented to the court. When the petition is made orally and then taken down in writing by the secretary, the date and name, as above, must, of course, be noted down by the secretary. (Schulte, Eheproc. p. 119.)

to examine carefully,[1] though extrajudicially,[2] whether the alleged annulling impediment, and consequently the asserted nullity of the marriage, rests upon proofs which appear *prima facie* full and conclusive. For it would be evidently worse than useless to begin a process where there is no good reason or proof for assuming the invalidity of the marriage, or where the nullity, if it really exists, cannot be juridically proved. Hence, in this preliminary investigation, the judge should seek orally from the plaintiff and others all the available information on the alleged impediments.[3]

664. Thus the Instr. Austr. § 141, speaking of this preliminary inquiry, says: "Commissarius ad inquirendum deputatus, antequam ad probationes in forma juris instituendas procedatur, anniti debet, ut omnium circumstantiarum, quae ad matrimonii valorem vel nullitatem extra dubium ponendum facere possint, adcuratam acquirat notitiam. Hunc in finem pro conditione casus et personarum necessariae percunctationes faciendae; postea conjuges, personae matrimonium accusantes, vel quae impedimentum denuntiarunt, et in quantum fieri potest, etiam testes qui pro matrimonio aut contra illud producuntur, defensore matrimonii praesente, praevie interrogandi sunt." Both during this preliminary inquiry and at the trial, the spouses and the plaintiff, who must always appear in person, can be accompanied and assisted by advocates.[4] It is well also to invite the *defensor matrimonii* to be present at the preliminary inquiry, as is apparent from the Instr. Austr. just quoted.[5] Moreover, the juridical peti-

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[1] Instr. Austr. § 141.

[2] Hence in the preliminary inquiry, the oath should not be administered to the accuser, spouses, or witnesses. (Schulte, Eheproc. p. 35.)

[3] Cf. S. C. de P. F. Instr. cit. §§ 5, 6; Schulte, Eheproc. p. 131.

[4] C. Pl. Balt. III. n. 307; Instr. Austr. § 143.

[5] At least the results of this investigation should be communicated to the official defender, so that he may object, if he sees fit, to the opening of the trial, v.g., on the ground that there is not at least a half proof of the alleged impediment. (Schulte, Eheproc. p. 132.)

tion for the annulment is necessarily to be communicated to the defender of the marriage, so that he may object to its admission, either because of its defective form or substance, or because it is made by one who has no right to make it or who lost this right if he formerly had it, or because the judge to whom it is presented is not competent in the particular case.[1]

665. When it is found, at the end of this preliminary and informal inquiry,[2] that the petition for the annulment of the marriage (*accusatio matrimonii*) has no solid foundation, or that the alleged impediment rests upon no canonical proofs, or that there are but slight and insufficient proofs, the judge should advise the petitioner to withdraw the petition, or he should simply reject it himself.

666. But when it is found that there are good proofs, v.g., a canonical half-proof, extant of the existence of the alleged impediment and consequent nullity of the marriage, the process or trial, or rather its probatory term, can then be begun.

667. However, before beginning the trial, the bishop should endeavor to remove the cause of the invalidity or the diriment impediment, and thus render the marriage valid according to the rules laid down above, either (*a*) by inducing the couple to renew their consent, where there is question of impediments *juris privati*, v.g., fear, error, etc., or (*b*) by persuading them to ask for a dispensation, where there is question of impediments *juris publici* which admit of a dispensation. If they refuse to do this, and insist upon the annulment, nothing remains but to begin the trial. This is done by appointing a day and place for the opening of the trial and the judicial hearing, and by citing the parties, that is, the petitioner, the spouses and the witnesses, and the

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[1] Schulte, Eheproc. p. 132.

[2] The *libellus*, or petition for the annulment, may be amended in accordance with the results of this preliminary inquiry. (Schulte, Eheproc. p. 131.)

defensor matrimonii, to be present. We shall now discuss the citation.

CHAPTER III.

THE CITATION.

ART. I.

NATURE AND NECESSITY OF THE CITATION.

668. THE first step of the trial proper in matrimonial causes of nullity is the citation of the defendant, that is, of the party against whom the annulment of the marriage is demanded. As was seen, sometimes one of the spouses and sometimes both are the defendants. The *defensor matrimonii* is also, in all causes of nullity of a marriage, necessarily co-defendant. We have said that the citation is the first step of the process proper. And indeed, when the judge has determined, as a result of the preliminary investigation, that there is *prima facie* complete or, at least, half-proof of the asserted impediment, and resolves, in consequence, to proceed with the case, it becomes the right and duty of the accuser of the marriage to produce in court juridical proofs of the asserted impediment, and of the defendants to offer proofs in rebuttal to show that the impediment does not exist.

669. To give the parties an opportunity to produce their proofs, the judge should appoint a day on which the production of these proofs shall begin before him. He should inform all the parties, particularly the defendants and the *defensor matrimonii*, of the day appointed, and invite or, if need be, command them to appear on said day before him and present their statements and proofs to him. This invitation or command of the judge is called the citation. We shall briefly touch on the nature, division, necessity, and contents of the citation in matrimonial causes of nullity.

670. Q. What is the citation in matrimonial causes of nullity?

A. It is a judicial act of the judge by which he commands the petitioner for the annulment of the marriage, the defendants, and also the witnesses to appear in court, at a specified time and place, in relation to the marriage contracted whose validity or invalidity is to be juridically discussed and decided. It will be observed that the definition speaks of the citation in general, and therefore as applicable to witnesses as well as to the principals in the cause. In fact, a citation is simply the act of the judge ordering a person to appear in court. This command, as addressed to the plaintiff, is called the citation of the plaintiff; as addressed to the defendant, the citation of the defendant; finally, as addressed to witnesses, the citation of witnesses. We speak here chiefly of the citation of the defendants. For, as a rule, no citation is needed for the plaintiff. The citation of witnesses has been already explained.

671. Q. Is it always necessary to summon the defendants in a matrimonial cause of nullity?

A. 1° The spouse who is the defendant must always be cited to appear for trial, so as to be enabled to give his or her statement of the case and produce proofs. If the defendant spouse is not cited, the whole subsequent trial will be invalid.[1] Where a third party is the petitioner for the annulment, both spouses become defendants. Nay, both spouses must always be cited, and therefore even where one of them is the plaintiff, on pain of invalidity of the proceedings. This follows plainly also from the Instr. *Causae Matr.* §§ 18, 20, which says: "Secundo loco veniunt *conjuges ipsi*, qui *semper* et seorsum *audiri* debent, ut unusquisque jura sua tueri, et rationes, deductiones ac facta allata, aut rejicere aut explicare queat. . . . Post conjuges citandi erunt testes," etc.

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[1] Cf. Our Elements, vol. ii. n. 1000.

672. The reason is that the proposed annulment of the marriage involves the most important rights of the married couple. In fact, it involves the disruption of all the rights acquired by the married couple through their marriage, such as the marital *copula*, the right to support on the part of the wife, the society and companionship of each other, rights of property, of inheritance, etc.

673. 2° The *defensor matrimonii* is also to be cited to be present at all the judicial proceedings. Otherwise they are invalid. Thus the Const. *Dei miseratione* of Pope Benedict XIV. decrees under article 7: "Quaecunque vero, eo (defensore) non legitime citato aut intimato, in judicio peracta fuerint, nulla, irrita, cassa declaramus," etc. The Instr. S. C. de P. F. *Causae Matrimoniales* says likewise under article 10: "Defensor matrimonii a moderatore actorum citandus erit ad quaelibet acta, ne vitio nullitatis concidant."

ART. II.

SERVING OF THE CITATION.

674. Q. Whether and how the citation is to be made known to the parties, and especially to the defendant spouse or spouses?

A. 1° The citation must naturally be duly and properly served on the parties who are cited. In other words, it must be made known or delivered to them. This follows from the very nature of the citation. Hence a citation which is not properly communicated to the parties cited is of no effect whatever, and is regarded by the law as not having been made at all.

675. 2° There are two ways in which the citation can be delivered or communicated to the parties cited, also in matrimonial causes, namely: (*a*) *secretly*, v.g., by mail, or by a messenger; (*b*) *publicly*, that is, by public announcement or notification made from the altar, during Mass, on Sun-

days or holidays, or posted in a public place, or inserted in a newspaper.[1] As a rule, the citation, also in matrimonial causes of nullity, should be made known to the parties in a private or secret manner, i.e., by mail or by a messenger.[2] For, as a rule, these matters should be kept from the public, both to shield the honor and good name of the litigants, and to prevent gossip, etc. We say, *as a rule*, because it is evident that the citation may be delivered to the parties in a public manner where it is necessary, that is, where it cannot be delivered to them in any other manner, v.g., when it is not known where the husband or wife who is to be cited lives, as happens frequently in the United States.[3]

676. 3° The fact that the citation has been executed—that is, served on the parties, especially the spouses, in one or other of the above ways—should be carefully recorded among the minutes or acts of the proceedings, so that there may thus be proof that the citation was duly communicated to the parties.[4]

ART. III.

CITATION OF PARTIES WHO LIVE FAR AWAY.

677. Q. What is to be done where the married couple whose marriage is under juridical discussion, or other parties, v.g. witnesses, live far away and cannot on that account come to the tribunal of the judge?

A. In matrimonial causes of nullity both the spouses whose marriage is called in question should always, if at all possible, appear in person before the judge or moderator, and be examined before him.[1] But it will not unfrequently happen, particularly in this country, where people often move from one place, diocese, or State to another and even to Europe, that one or both of the married couple, and also others who are to be examined, in a matrimonial cause of nullity, cannot come to the tribunal of the judge who is conducting the trial, because they live too far away.[2] The latter may happen in two ways: (*a*) when the parties live indeed in the same diocese with the judge, but too far away to come without considerable expense, loss of time, or other inconveniences; (*b*) when they live in a different diocese, situate at a great distance.

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[1] Our Elements, vol. ii. n. 996.

[2] In matrimonial causes especially, it will often be found most useful to deliver the citation to the parties, particularly to the defendant spouse or spouses, by means of their parish priest. In this manner, the parish priest can explain to them the nature of the citation, the obligation of complying with it, etc., and thus ensure the appearance of the parties cited. The same will not unfrequently apply to the citation of witnesses.

[3] Our Elements, vol. ii. n. 998, 1005.

[4] Ib. n. 1007.

678. Now it is evident that a judge cannot oblige or cite anybody, and therefore not even the spouses themselves, to appear before him when such person lives at a considerable distance from the matrimonial court, and consequently cannot come without grave inconvenience, and is thus morally or physically unable to appear. What, then, should the judge do in the case? Where the parties live in the same diocese with him, but too far away, he should either go to their residence with the secretary and examine them there, or delegate an ecclesiastic, v.g., the rural dean living near them, to cite and examine them. Where they live outside the diocese and too far away, the matrimonial court should write to the bishop of the diocese where they have their domicile, requesting and delegating him to cite and examine them in the diocese where they live, and asking him to forward the minutes containing the depositions of the spouses or the testimony of the witnesses.[3]

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[1] Instr. Austr. § 146.

[2] We suppose, in the case, that the parties to be cited live indeed far away, *but that it is known where they live.* Hence there is no question here of the necessity of a *public* citation, but of the right to cite parties who live at a great distance.

[3] Schulte, Eheproc. pp. 135, 136.

679. To enable the ecclesiastic or ordinary thus requested and delegated to examine the parties properly, the judge delegating should send, together with his request and delegation, an accurate statement of the facts in the case, and also the questions to be put to the parties.[1]

680. All this is clearly set forth in the Instr. *Causae Matr.* under article 15, thus: "Si aliquando contingat examinandos" (the Instr. clearly means not only witnesses, but also the married couple) "apud exteras et forsan longinquas regiones versari, nec tribunali se sistere posse, a moderatore actorum accurata factorum et circumstantiarum, quarum cognitio et confirmatio requiritur, expositio erit facienda, quae concinnatis opportunis interrogationibus, de sententia quoque defensoris matrimonii, et indicatis examinandorum nominibus, ad Ordinarium loci, in quo commorantur, mittatur, ut ille, sive per se, sive per suum vicarium generalem, sive per alium virum probum expertum e clero eligendum, eos examini subjiciat juxta datas interrogationes, requisito prius juramento de veritate dicenda, et caeteris servatis quae supra praescripta sunt."[2]

ART. IV.

CONTENTS AND EFFECTS OF THE CITATION.

681. Q. What should be the contents of the citation in matrimonial causes of nullity?

A. The citation, especially of the defendant spouse or spouses, in order to be lawful and valid, should state: 1° the name and surname of the judge issuing it; 2° the name and surname of the party at whose demand it is issued, that is, of the petitioner for the annulment of the marriage, and that whether he be one of the spouses, or a third person, or the fiscal procurator of the diocese; 3° the cause of the citation, that is, the matter of the trial, namely, the annulment of the marriage owing to a diriment impediment; 4° the name and surname of the person cited; 5° the time when and the place where the person cited is to appear.[1] The time fixed should reasonably suit the convenience of the person cited, otherwise the citation would have no effect.[2]

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[1] Cf. our New Procedure, n. 248 sq.

[2] Cf. Instr. Austr. § 146.

682. We have said that the matter of the trial is to be stated in the citation. The question is whether this should always be done in a *specific* manner, or whether it is sufficient to do so in a *general* and *indeterminate* way. Where prudence does not forbid, the matter of the trial, that is, the proposed annulment of the marriage, should be set forth in a distinct and specific manner, so as to enable the person cited to come prepared to make his or her statements. For this purpose, a copy of the accusation of the marriage, or of the juridical petition for its annulment, may be enclosed in the citation. We say, *where prudence does not forbid.* For sometimes the spouse who is the defendant, if informed of the precise nature of the case, might either refuse to appear or cause great trouble to the accusing spouse or party. In such a case, it would be sufficient to state in the citation, in a general way, that the party is cited in order to be heard on disputed matters relating to the marriage.

683. Q. What are the effects of a legitimate citation, also in matrimonial causes of nullity?

A. Chiefly these[3]: 1° The person cited, whether he be a principal or a witness, is bound to appear, unless he has a just excuse. This obligation is not always sufficiently understood by Catholic lay people, especially in this country. 2° The *litis pendentia* is produced, and consequently pending the trial no change should be made in the status of the person cited which would be injurious to his interests.

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[1] Cf. our Compendium Juris Can. n. 1065.

[2] Schmalzg. l. 2, t. 3, n. 20.

[3] Our Elements, vol. ii. n. 1008.

3° The citation constitutes the person cited a legitimate opponent, and therefore gives him a *personam standi in judicio*, even though in reality he has no such standing. 4° It continues the jurisdiction of the judge, so that the party cited is obliged to appear before him, even though he has meanwhile become subject to another ordinary.[1] Thus the Instr. *Causae Matr.* of the S. C. de P. F. says, under article 2: "Postquam citatio judicialis intimata est, mutatio quoad conjugum domicilium facta, mutationem respectu judicis competentis minime operator." Of course, these effects are produced only by a legitimate and valid citation. An invalid citation produces no effects whatever.[2]

684. Q. Who can and should be cited also in matrimonial causes of nullity?

A. 1° All those, and only those, who are subject to the jurisdiction of the judge issuing the citation *can* be cited by him. For the citation is an act of jurisdiction. Now jurisdiction can be exercised over subjects only. Hence where a bishop or a moderator of a matrimonial court finds it necessary to cite and examine a person—whether he be a principal or a witness—who has his domicile in the diocese of a different ordinary, he should request the latter to cite and examine the party, and transmit the result to him, as we have already seen. However, as we have shown, this does not apply to a person who, after having been duly cited, leaves the diocese. For once a person has been legitimately cited he remains, so far as concerns the cause or matter in which he was cited, subject to the judge citing, even though he moves out of the latter's territory.

685. 2° The following persons *should* be cited, also in matrimonial causes of nullity: (*a*) principally the defendant, that is, in matrimonial causes, the defendant spouse or spouses whose marriage is impugned;[3] (*b*) after the defend-

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[1] L. 7 ff. de judic. (v. 1).

[2] Schmalzg. l. 2, t. 3, n. 30.

[3] Schmalzg. l. 2, t. 3, n. 28.

ant, all others whose interests are involved in the cause should be summoned, so that they may have an opportunity to protect their interests.[1] Hence, as we have seen, in matrimonial causes of nullity both the husband and the wife whose marriage is under discussion must be always cited, no matter whether one of them is the plaintiff and the other the defendant, or whether both of them are defendants.

ART. V.

CONTUMACY OF THE PARTIES, OR THEIR REFUSAL TO OBEY THE CITATION.

686. When the party cited, especially the defendant spouse or spouses, fails to obey the citation without a just excuse, he or she shall, also in matrimonial causes of nullity,[2] be cited a second time, and that peremptorily. If he contemns even this second citation, he shall be regarded as contumacious, and the trial can then go on in his absence. It will be observed that contumacy is a *stubborn* disobedience to the commands of the judge. Hence a person is guilty of contumacy only when he refuses the *reiterated* or *peremptory* commands or citation.[3]

687. A person or a spouse may be contumacious, also in matrimonial causes, in two ways: 1° *Truly or really*, namely, when the citation was served upon him in person, v.g., by a messenger, so that there is no doubt that it reached him; 2° *Presumptively*, that is, when the citation was not delivered to him in person, but was made by public notification, v.g., in a newspaper, and where consequently it is doubtful whether it really came to his knowledge or not. In other words, from the fact that the citation has been made in a

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[1] L. 39 ff. de adopt. (i. 7); L. 47 ff. de re judic. (42, 1).

[2] Arg. Instr. *Cum Magnopere*, S. C. de. P. F. § 24.

[3] Our Elements, vol. ii. n. 1010.

public manner, the law infers or presumes that it has reached the party cited.

688. Q. What are the effects of contumacy, especially of the married couple, in matrimonial causes of nullity?

A. 1° In causes other than matrimonial, contumacy produces among other effects these: (*a*) contumacy, true or presumptive, constitutes a *presumption* (not proof) of guilt against a defendant who is contumacious; (*b*) a defendant guilty of *true* contumacy is not heard even when he does appear,[1] and loses the right to appeal against the final sentence.

689. 2° We have said, *in causes other than matrimonial;* for, in matrimonial causes of nullity the two above effects are not produced by the contumacy, even though true, of one or both of the spouses whose marriage is the matter of the trial. In other words, the contumacy of the parties or of the spouses does not constitute any presumption whatever *against the validity* of the marriage, nor does it cut off the right of appeal against the sentence declaring the marriage invalid, nor does it preclude the reopening of the case. Thus the Instr. Austr. § 150 says: "Quod conjuges aut alter eorum haud compareant, adversus matrimonii valorem nihil probare potest; unde eo, probandi onus matrimonium accusanti incumbens haud diminui debet."

690. The reason is that the spouse or spouses may and frequently do stay away or disobey the citation because they are tired of the marriage, and are consequently anxious to break it up even where it is certainly valid. It is also on this account that admissions of spouses do not constitute proof *against* the validity of their marriage. Consequently the court and the *defensor matrimonii* should, in case the spouse or spouses refuse or fail to appear, do all in their power to supply the place of the absentees, and therefore col-

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[1] Schmalzg. l. 2, t. 14, n. 39.

lect with all possible care and prudence whatever evidence tends to throw light on the disputed facts.

691. 3° But in matrimonial causes of nullity, as in other causes, the contumacy, true or presumed, of the parties or spouses produces this effect, that the trial or process can and should go on in the absence of the contumacious party.[1] Of course, the *defensor matrimonii* must, as far as he can, be always present at the trial, and supply the place of the absent defendant spouse or spouses. If even the *defensor matrimonii* fails to defend the validity of the marriage properly, he should first be given a warning, and, if he does not heed it, he may be visited with censures or removed from office, and another person may be appointed in his stead.[2]

692. The above is expressly enacted in the Instr. Austr. under article 145, thus: "Conjugibus, qui citatione facta non comparent . . . terminus (novus) eis pro domicilii distantia dimetiendus statuatur. Eo elapso . . . procedura etiam absque citati praesentia inchoanda est."

CHAPTER IV.

EXCEPTIONS MADE BY THE PARTIES, AND THE JOINING OF ISSUE.

ART. I.

EXCEPTIONS MADE BY THE DEFENDANTS.

693. IF the defendant spouse (or spouses, as the case may be) obeys the citation and appears in court, he or she can, at once and before joining issue, make or present his or her legitimate objections or exceptions. Of course, as we shall see, some exceptions may be made, not only prior to the *litis contestatio*, but during any part of the proceedings. We

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[1] Schulte, Eheproc. pp. 135, 136.

[2] Ib. pp. 145, 146.

shall now briefly examine (*a*) what is meant by exceptions in a matrimonial cause; (*b*) how they are divided; and (*c*) how they are proposed in the causes under discussion.

694. Q. What is meant by exceptions in matrimonial causes of nullity, and how are they divided?

A. They are those statements, demands, or objections of the defendant spouse, or of the *defensor matrimonii*, by which the action for the annulment of the marriage contracted is either delayed or altogether destroyed.

695. Q. How many kinds of exceptions are there, also in matrimonial causes of nullity?

A. As will be seen from this definition, exceptions are divided chiefly into *peremptory* and *dilatory*.

I. *Peremptory exceptions*, in matrimonial causes of nullity, are those which quash the juridical petition for the annulment of the marriage, that is, throw it altogether out of court. They are also called *perpetual*, because they permanently and forever extinguish the petition. The exceptions of this kind may be reduced to two heads: 1° those which show that the foundation of the petition for the annulment, namely, the alleged diriment impediment, never existed, and that consequently the petitioner has no right whatever to make the petition; 2° those which demonstrate that the action or petition for the annulment has become extinct, and that therefore the petitioner has lost the right to make the petition. Exceptions of this kind, in the case of impediments *juris publici*, are that a *sanatio in radice*, or a dispensation from the impediment, has been obtained and executed; and in the case of impediments *juris privati* that the plaintiff spouse, who claims to have contracted marriage under grave fear or substantial error, has, upon the cessation of the compulsion, or after being informed of the error, ratified the marriage, either expressly or tacitly.[1]

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[1] Schulte, Eheproc. pp. 139, 140.

696. II. *Dilatory exceptions* are those which do not quash the action, but merely defer it for a time. There are various kinds of dilatory exceptions, also in matrimonial causes of nullity. 1° Some of them refer to the judge or auditor or moderator of the matrimonial court; for instance, if the defendant spouse or the *defensor matrimonii* objects that the judge or the moderator (*a*) has no competence or jurisdiction in the case because the spouses have not the prescribed domicile in the diocese; or (*b*) is suspected of partiality, or is ignorant of the law,[1] etc. 2° Others relate to the person of the plaintiff, or the petitioner for the annulment of the marriage; v.g., if the defendant spouse or the *defensor matrimonii* objects to a third party making the petition, on the ground that the alleged impediment being *juris privati*, the right to make the petition belongs only to the married couple and not to a third party. 3° Lastly, others concern the action itself or the proceedings, v.g., where a person objects that the petition for the annulment is vague, obscure, doubtful, or does not describe the impediment properly.

697. Q. At what stage of the proceedings are the exceptions to be made, also in matrimonial causes?

A. 1° *Dilatory* exceptions should, as a rule, be made and proved prior to the joining of issue, or the *matrimonii contestatio*.[2] This holds particularly of exceptions against the competence or judicial integrity of the matrimonial court. Thus the Instr. Austr. says, under article 103: "Si conjuges qui in causis matrimonialibus citantur, competentiam tribunalis impugnare posse antumant, eidem intra decem dies post citationem intimatam, exceptiones suas exponere debent. Quando reclamatio pro non fundata declaratur, liberum eis est, ad instantiam proxime superiorem appellationem dirigere."

698. 2° *Peremptory* exceptions should, generally speak-

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[1] Card. Kutschker, l. c. vol. v. pp. 558, 559. [2] Our Elements, vol. ii. n. 1031 sq.

ing, be made after the *contestatio matrimonii*, or the joining of issue.[1]

699. Q. Has the defendant spouse or the *defensor matrimonii* a right to make both dilatory and peremptory exceptions in matrimonial causes of nullity?

A. Yes. The reason is plain. The most important rights, both of the marriage itself and of the married couple, are at stake in the process for the annulment of a marriage. Hence both the *defensor matrimonii* and the defendant spouses have the fullest right, nay, duty, to defend the marriage against the attacks made upon it by the petitioner for the annulment, whether he be one of the spouses, or the fiscal procurator, or a third person. Now reasonable exceptions are an essential and important part or weapons of a just defence, and consequently cannot be denied in the causes under discussion. This right is clearly implied in the Instr. *Causae Matr.* § 18, and in the Instr. Austr. §§ 100, 103, 104; it is expressly stated in the law of the Church, which decrees, on the one hand, that matrimonial causes shall be adjudicated in a summary manner,[2] and, on the other, that in the summary procedure just and reasonable exceptions are to be admitted.[3]

ART. II.

CONTESTATION OF THE MARRIAGE.

700. After the exceptions of the defendant spouse and the *defensor matrimonii* have been discussed, and either wholly or partially admitted or rejected, or after decision on them has been reserved in order to be given later or together with the final sentence, the entering of the plea, or the contestation of the marriage (*litis seu matrimonii contestatio*), takes place. This joining of issue or contestation

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[1] Our Elements, vol. ii. n. 1033.

[2] Clem. *Dispendiosam* 2, de jud. (ii. 1).

[3] Clem. *Saepe* 2, de V. S. (v. 11).

of the marriage consists in the affirmation of the alleged diriment impediment and of all its details and circumstances by the petitioner for the annulment, and the denial of them, either in whole or in part, by the defendant spouse or the *defensor matrimonii*, in court, that is, before the judge, assisted by the secretary, who records what is said and done.

701. The aim and necessity of this joining of issue are plain. The hearing or trial consists in this, that the judge hears and receives whatever legitimate proofs the opposing parties present in support of their respective claims or allegations. Hence, before presenting proofs, each party should juridically state, in a clear, full, and detailed manner, the nature of its respective claim, petition, or denial. In this manner it will appear clearly and fully, from the very outset, what each party claims or denies, and consequently what is to be proved or disproved. This determining, therefore, of the true nature of the issue, or of facts to be proved, is the corner-stone and foundation of the whole trial, and is consequently necessary, at least in an informal way, also in matrimonial causes of nullity.

702. Q. In what manner is the contestation to be made in matrimonial causes of nullity?

A. 1° It need not be made in any formal manner, or in any set form of words or phrases. For the procedure in matrimonial causes is summary. All that is required is that both sides should personally and under oath give a full and circumstantial statement of their respective positions, claims, or denials, and indicate at the same time what proofs they intend to produce in support of their respective statements or allegations.

703. 2° The informal manner in which this is to be done is clearly laid down by the S. C. de P. F. Instr. *Causae Matrimoniales*, §§ 17, 18, 19, and is mainly as follows: (*a*) The judge or moderator of the matrimonial tribunal appoints a day for this contestation or fixing of the issue, and cites both

the petitioner for the annulment and the defendant spouse, and also the *defensor matrimonii*, to appear in court on the day appointed.

704. (*b*) On the day appointed the plaintiff, that is, the spouse or the third party making the petition for the annulment of the marriage, is the first one who, under oath and in court, states and reaffirms the invalidity of the marriage or the diriment impediment, and that fully and with all the necessary details, and consequently repeats what he or she had already stated in the written petition for the annulment and also in the extrajudicial preliminary investigation. This is laid down in the above Instruction, *Causae Matr.*, art. 17, as follows: " Inter examinandos primo loco venit ille qui accusationem contra matrimonium movit. Ab isto exquirendum erit, ut clare distincteque exponat accusationis titulum; facta omnia fideliter et religiose enarret, eorumque probationes afferat; circumstantias omnes et indicia exponat quae vel ex propria scientia cognoverit, vel ex aliorum relatione didicerit; et denique nominet testes quas de re instructos sciverit, vel saltem reputaverit."

705. (*c*) Next the defendant—that is, one of the spouses, if the other is the plaintiff, or both spouses, when a third party is the plaintiff—makes his statements, or gives his version of the pretended impediment and invalidity of the marriage, denying in whole or in part the allegations of the petitioner for the annulment of the marriage. To enable the defendant to make a suitable reply to the petitioner's statements, the latter should be communicated to him, either before or at least during the *litis contestatio*. The S. C. de P. F. says in the Instruction already quoted, under article 18, in regard to the plea of the defendant spouses: " Secundo loco veniunt conjuges ipsi, qui semper et seorsum audiri debent, ut unusquisque sua jura tueri, et rationes, deductiones, ac facta allata aut rejicere, aut explicare queat."

706. (*d*) Each spouse, that is, the plaintiff spouse and the

defendant spouse, can, either immediately after making his or her statements, and being examined, or later on, though prior to the publication of the process, hand to the judge questions (*articuli—positiones*), upon which the other spouse is to be examined and interrogated.[1] Thus the Instruction of the S. C. de P. F. says, under § 18: "Quaelibet pars examini subjecta poterit vel illico post examen, vel etiam deinceps, antequam processus claudatur, proponere si velit, articulos, super quibus alter conjux sit examinandus; et quatenus etiam ab hoc articuli proponantur, erit iterum citandus conjux qui primus fuerat examinatus, ut super articulis ab altero propositis audiatur."

707. To bring out the facts of the case more fully and clearly, both the plaintiff and the defendant are submitted to a thorough and careful examination by the judge and the defender of the marriage bond. It will be seen that both the plaintiff and the defendant spouse or spouses must make their statements under oath. Herein the matrimonial process differs from the criminal trial, where a defendant is not allowed to depose under oath, lest he should perjure himself.

708. There is still another very important difference to be noted here between a matrimonial process and any other trial, criminal or civil. If, in a cause other than matrimonial, the defendant, in his answer, statements, or joining of issue, admits simply and unqualifiedly the plaintiff's allegations or claims, the cause is by that very fact or confession terminated in favor of the plaintiff. For a juridical confession or admission is justly termed the queen of proofs, as against the party making it.[2] This does not hold in matrimonial causes of nullity. In other words, even where both the plaintiff and the defendant spouse admit or state that the impediment exists, and that consequently their marriage is invalid, this admission or confession of the defendant spouse

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[1] For specimens of these questions, see Olindens. Matr., 1 Sept, 1883, pp. 34, 38, 45, 46 sq., 73, 90 sq.

[2] Our Elements, vol. ii. n. 822, 1064.

or spouses does not of itself constitute any proof whatever as against the validity of the marriage. For it may be the result of collusion between the two spouses, who may both be anxious to break up their marriage in order to be free to marry again. Hence, even where both spouses admit the invalidity of the marriage, this invalidity must be nevertheless fully proved by other canonical evidence, v.g., by two witnesses. Consequently the judge and the defender are to do what is set forth in articles 19 and 20 of the Instruction, namely, first carefully re-examine the couple, and then proceed to the production of other proofs.

709. Thus article 19 of the Instruction decrees: "Si ambo conjuges concordes in depositionibus fuerint, moderator actorum et defensor matrimonii sedulo inspiciant utrum inter eosdem collusio intercesserit. Hoc in casu singula argumenta contra eorum depositiones ex processu resultantia distincte iisdem objiciantur, ut fraude, si qua fuerit, detecta, veritas, quoad fieri possit, dilucide appareat."

710. Finally, it should be observed that during the above examinations which constitute the *litis contestatio*, and during any other stage of the trial, the spouses can be accompanied and assisted by advocates.[1] The direct examination of the parties may be conducted by their respective advocates; the cross-examination of the plaintiff and his witnesses, by the *defensor matrimonii*. It is needless to say that the above examinations are of the utmost importance and should be as thorough and complete as possible. For in marriage causes the facts are generally of such a nature that they are better known by the married couple than by any one else.

711. The judge and the defender of the marriage bond can always ask questions as they may deem it opportune. According to the Instruction of the S. C. C. dated Aug. 22, 1840, the *defensor matrimonii* is to write out all his questions beforehand, and hand them sealed to the judge or the sec-

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[1] Conc. Pl. Balt. III., n. 307; Instr. Austr. § 143.

retary, to be opened by him only in court.[1] In our procedure, as laid down by the S. C. de P. F., this is not required, and would, in fact, under our circumstances, impose a very difficult task upon the *defensor matrimonii*. Hence, with us, he need not write out and seal his questions, but may ask them according as the answers given suggest or as circumstances may warrant. Of course, it is prudent to write down beforehand questions of an important character.

CHAPTER V.

PRODUCTION OF PROOFS.

ART. I.

GENERAL REMARKS. THE BURDEN OF PROOF.

712. AFTER the plea or contestation, that is, after the petitioner for the annulment of the marriage, as well as the defendant spouse, has fully explained his or her own version of the facts, as stated in the foregoing article, and both parties have thus clearly fixed the issue before the court, the next step is that the petitioner shall prove his statements, and that the defendant spouse and the *defensor matrimonii* shall disprove or refute them. In other words, the plaintiff must now produce before the court his witnesses, documents, etc., to show that the alleged impediment really exists, and that consequently the marriage is invalid. Afterward the defendant has to produce his witnesses, etc., for the purpose of overthrowing the force of the proofs brought forward by the plaintiff, and of demonstrating that the alleged impediment does not exist in the case.

713. The present stage of the trial, namely, the production of proofs before the judge, is the most important part of the whole process. In fact, it is the focus or central part toward which all other parts or stages of the procedure

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[1] Our Elements, vol. ii. p. 437, n. 1611.

converge. For, as we have already said, the whole and sole aim of the procedure in matrimonial causes of nullity is to *prove* the validity or invalidity of a marriage already contracted. In other words, the whole object of the trial is to ascertain the true facts regarding the alleged invalidity of a marriage by means of proper proofs. Proofs are, therefore, the means of arriving at the truth. The greatest care should consequently be exercised both by the petitioner for the annulment of the marriage and by the defendant spouse in the production of their proofs at this stage of the trial.

714. It will also be seen that the production of proofs follows naturally and properly upon the contestation or joining of issue. In the contestation the parties or principals, that is, the petitioner for the annulment and the defendant spouse, make their respective statements of the case. These statements are simply *affirmations* or *claims*, not *proofs*. Hence these statements or affirmations must be proved.

715. We have already dwelt at sufficient length upon the nature, force, and manner of production of the various judicial proofs in matrimonial causes of nullity. Here we shall confine ourselves to grouping together and describing the manner in which both the petitioner for the annulment and the defendant spouse produce their proofs for or against the alleged invalidity of the marriage. We shall first speak of the production of proofs by the plaintiff; then by the *defensor matrimonii* and the defendant spouse.

716. The plaintiff, that is, the petitioner for the annulment of the marriage, is obliged to produce his proofs *first*, as we have already said. For the presumption of law is that a marriage contracted in an apparently valid manner is valid. Consequently the burden of proof falls upon the one who denies its validity or affirms its invalidity. It is also a rule of canon law that the *onus probandi* in judicial proceedings lies upon the person who asserts or affirms something prejudicial to another person. Now the petitioner for the

annulment, by his petition, asserts, to the detriment of the marriage and of the defendant spouse, that it is invalid.

717. Nor is the petitioner for the annulment relieved of the necessity of proving the alleged invalidity of the marriage if the defendant spouse admits it. For, as we have seen, in matrimonial causes of nullity the statements or admissions of the spouses, as *against* the validity of the marriage, are of no force. We shall now see how the plaintiff presents his proofs to the court.

ART. II.

HOW THE PETITIONER PRODUCES PROOFS.

718. Q. How does the petitioner for the annulment of the marriage now produce his proofs before the matrimonial court?

A. 1° At the present stage of the proceedings, that is, after the contestation of the marriage, or after the defining and determining of the issue or questions involved, the petitioner for the annulment must produce all his evidence or proofs, that is, all his witnesses, documents, etc., and that in a juridical manner, and just as though there had been no preliminary investigation into the alleged impediment or invalidity of the marriage. Herein matrimonial causes of nullity differ from criminal and disciplinary causes as conducted at the present day. For in the case of the latter a thorough preliminary *judicial* inquiry into the alleged crimes (*processus informativus*) must, as a rule, be instituted before the accused can be cited for trial. Whereas, in matrimonial causes of nullity there is and should be indeed a preliminary *extra-judicial* inquiry into all the facts of the alleged invalidity,[1] but there is no preliminary *judicial* investigation.

719. The reasons of this difference are (*a*) because the citation for trial in matrimonial causes of nullity is not *per se* a disgrace, as it is in criminal and disciplinary causes; (*b*) be-

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[1] S. C. de P. F. Instr. cit. § 5; cf. C. Pl. Balt. III. n. 305, ii.

cause a preliminary judicial investigation would, as a rule, be next to impossible, at least in this country, as it would make it necessary to cite and examine the witnesses twice, namely, once before and once after the *litis contestatio.*

720. 2° The manner in which the petitioner for the annulment now produces all his proofs before the matrimonial tribunal has already been described, and differs somewhat according to the different kinds of proofs produced by him. In the case of *witnesses* the procedure is as follows: The petitioner hands the judge a list of their names, and asks him to cite them to appear and give testimony. On the day appointed they are sworn in the presence of the defendant spouse and also of the *defensor matrimonii*, and then give their testimony orally in the presence of the judge and of the secretary, the latter carefully taking down the questions and answers. The witnesses are subject to cross-examination by the *defensor* and by the opponent spouse or his or her advocate, in the manner already explained. In producing *documents* the petitioner proceeds thus: He presents the document or paper to the judge or auditor of the matrimonial tribunal. The secretary then marks upon it the day, month, and year of its presentation and the name of the person presenting it. It is then exhibited in court to the opposing spouse or party, so as to enable him to dispute its genuineness or veracity. In the production of all other evidence the procedure is similar to the above.

721. From this it will be seen that, in the production of evidence of whatever kind, the following rules are to be observed by the petitioner for the annulment of the marriage: 1° The proof is to be produced (*a*) before the judge or the moderator of the matrimonial court, and that in a session of the court, (*b*) in the presence of the opponent, and of (*c*) a secretary or notary, who writes the minutes of the proceedings. 2° Of course, it is to be presented to the court at the present stage of the proceedings, that is, as a rule, neither

before the contestation of the marriage nor after the taking of testimony is closed. It is scarcely necessary to repeat here that the proofs themselves must be clear, to the point, full and conclusive, and unexceptionable or free from defects.

ART. III.

DIFFERENT WAYS OF PROVING DIFFERENT IMPEDIMENTS.

722. Q. How should the petitioner for the annulment of the marriage proceed in proving the different kinds of diriment impediments which annul marriages already contracted?

A. The invalidity of a marriage already contracted can be caused only by the fact that a specific diriment impediment existed at the time of its celebration. Hence, in order to prove the invalidity of a marriage already contracted, the petitioner for the annulment of a marriage must prove the existence of a diriment impediment at the time of its celebration. Now, as we have seen, there are many such diriment impediments, each differing from the other. Naturally, therefore, as the impediments are different, the manner of proving each particular impediment differs in some respects from that of proving the others. Thus it will be seen that the production of proofs is to correspond or be adapted to the particular impediment on account of which the marriage contracted is impugned. Hence the plaintiff or petitioner for the annulment should before all else consider carefully what constitutes, according to the law of the Church, the alleged impediment, and what kind of proofs are in consequence necessary to establish its existence in the case. As married people or lay people in general do not know, at least fully and precisely, the constituent elements of the various impediments, it is advisable for them to lay the matter before their parish priest or confessor, or, if the case has already come before the judicial marriage tribunal, an ecclesiastical advocate, who will direct them what steps to take. We shall now briefly describe the several ways of proving the various impediments.

723. 1° If the marriage is impugned or attacked as invalid because of asserted error or misapprehension (*impedimentum erroris*), three things will have to be proved by the petitioner for the annulment: (*a*) that he or she was really in error or deceived at the time of the solemnization of the marriage; (*b*) that the misapprehension or deception was either with regard to the identity of the person, or that the person whom he or she married was entirely different from the one he or she meant to marry, or with regard to a substantial quality of the person which the party deceived or erring intended as a *conditio sine qua non;* (*c*) that the spouse erring did not, after discovering the error, either expressly or tacitly ratify the marriage contracted under the alleged misapprehension. These are all questions of fact, and must therefore be proved, like all other facts, either by witnesses, namely, by the parents, relatives, friends, neighbors, the parish priest, and the witnesses present at the marriage, or by letters, presumptions, etc.

724 2° A similar mode of procedure has to be followed in proving the alleged impediments of slavery, unfulfilled stipulations, or other defect in the marriage consent.

725. 3° When there is question of the impediment of fear (*impedimentum vis et metus*), the spouse petitioning for the annulment is obliged to prove by full canonical proofs (*a*) that he or she contracted marriage under grave fear or constraint (*b*) unjustly produced by external acts of violence, or by threats, (*c*) inflicted by a third person (*d*) for the purpose of impelling him or her to marry a certain person, (*e*) and that the party suffering the fear has not, after the cessation of the fear, ratified the marriage expressly or impliedly.

In other words, the fear is to be caused by external violence. These acts of violence, v.g., threats, harsh treatment on the part of parents, etc., must be fully proved by the spouse alleging the fear. Again, the fear must be of a grave or serious nature, or such that it will *considerably and strongly* influence a person. Now the fear will be grave in proportion as the threats, harsh treatment, etc., are serious, considering the temperament, age, sex, etc., of the person suffering the fear. As will be seen, all the above data are facts, which must therefore be proved like other facts, namely, either by witnesses, v.g., the parents, relatives, friends, or neighbors of both spouses, or by documents, v.g., letters of the spouses or the parents containing threats, etc., or also by other proofs.[1]

726. 4° If the marriage is impugned because of alleged impotency (*impedimentum impotentiae*), the spouse petitioning for the annulment must prove (*a*) that sexual impotency, whether relative or absolute, really exists in the case; (*b*) that it preceded the marriage or existed at the time the marriage was contracted; (*c*) that it is incurable, either absolutely or as between the two spouses of the marriage. It will be seen, from the very nature of this impediment, that the best and safest way of proving it is by the inspection or examination on the part of experts, i.e., physicians or midwives, of the sexual organs of the husband or wife said to be impotent. The manner in which this is done has already been outlined by us.[2]

727. 5° Where the validity of a marriage contracted is impugned on account of alleged consanguinity or affinity, the petitioner for the annulment, whether he be one of the spouses or the fiscal procurator *ex officio* or some other third party, is obliged to prove (*a*) that the parties married are blood-relatives or are related to each other by marriage

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[1] S. C. de P. F. Instr. cit. § 39.

[2] Supra, n. 546 sq.

within the forbidden degrees, as already explained; (*b*) that no dispensation from the impediment was obtained. Now it is plain that these two facts will be easily proved or disproved from the parochial records of marriages. For these records should give the names of the parties married and also of their respective parents. From these data it will be easy to draw a genealogical table or diagram showing the relationship between the parties.

728. 6° In like manner, if the marriage is impugned because of asserted spiritual relationship, the petitioner will have to show, for instance, that one of the married couple was godfather or godmother to the other in baptism or confirmation, and that no dispensation was obtained from the impediment. The latter can be easily proved from the parochial record of the marriage of the parties, which should always note the fact of a dispensation obtained and executed; the former can also be readily proved from the parochial records of baptisms and confirmations, which should give the names not merely of the persons baptized or confirmed, but also of their godfathers and godmothers.

729. The best proof, therefore, of consanguinity or affinity or of spiritual relationship is a certificate or genealogical table made up from the parochial registers, respectively, of marriages, baptisms, or confirmations. These documents, that is, certificates or tables, should be drawn up by the parish priest or by the episcopal curia. Thus the Instruction of the Propaganda says under article 31: "Talia documenta in forma authentica ex dictis libris (parochialibus) erunt haurienda opera parochorum vel curiae, una cum testimonio de eorum identitate cum respectivis particulis in libris extantibus; imo si a parocho testimonium datum fuerit, opus erit ut ejusdem parochi obsignatio a curia episcopali authentica declaretur." If any doubt remains as to whether these documents or certificates are genuine or truthful, wit-

nesses should be cited and examined, as provided by the Instruction *Causae Matrimoniales*, n. 32.

730. 7° If the marriage is impugned because of the impediment of adoption existing between the married couple, the petitioner must prove (*a*) that it really exists in the case, v.g., that, of the two married persons, one was the adopter, the other the adopted; (*b*) that the adoption has been made in accordance with the forms of the secular law of the country, and (*c*) is substantially the same as that contemplated by the Roman law. The fact of the adoption can be easily proved by the civil court record—for these adoptions are recorded—or, in default of this record, by witnesses who were present at or heard of the adoption. The question of law whether the alleged adoption corresponds substantially to that of the old Roman law can be proved by the secular codes of laws, or by legal experts, i.e., by lawyers testifying in regard to the laws on adoption as prevalent in the place.

731. 8° When a marriage is impugned because of alleged sacred orders or solemn vows (*impedimentum ordinis*, *imp. voti*), the petitioner for the annulment must prove that one of the two married persons received sacred orders, or made solemn profession in a religious order, prior to his marriage. The taking of both orders and solemn vows can be best proved by certificates from the bishop or the religious superiors attesting the above facts. In default of these certificates or authentic documents, recourse can be had to witnesses, notoriety, etc.

732. 9° If the validity of the marriage is contested because of alleged abduction (*impedimentum raptus*), the wife, claiming that she was abducted, is obliged to prove (*a*) that she was taken by force, or by deceit or undue persuasion, from a safe place to another place; (*b*) and that under these circumstances, that is, while under the control of the abductor, the marriage took place. All these things or events are mat-

ters of fact, and consequently are to be proved, like other facts, by witnesses, letters, etc.

733. 10° When it is claimed that a marriage already contracted is invalid by reason of *disparitas cultus*, the petitioner is obliged to prove (*a*) that, of the married couple in the case, one spouse was baptized and the other unbaptized at the time of the marriage; (*b*) that no dispensation was obtained or executed. The first can be proved partly from the parochial registers of baptisms, and from witnesses, v.g., the parents, relatives, etc., of the married couple; the second, from the parochial registers of marriages, or the bishop's archives, where the dispensations should be recorded, or also, in default of these, from witnesses, etc.

734. Similar rules are to be observed in proving other impediments not touched upon here. From all that has been said it will be seen how the petitioner for the annulment should proceed in proving the various kinds of impediments that may occur.

ART. IV.

MANNER IN WHICH THE DEFENCE PRODUCES REFUTATORY PROOFS.

735. After the plaintiff, or the petitioner for the annulment of the marriage—whether he be one of the spouses, or the fiscal procurator, or some other third party—has produced before the matrimonial court all his proofs or witnesses, documents, etc., the defendant, that is, the defendant spouse and the *defensor matrimonii*, has the fullest right to defend the validity of the marriage attacked by the petitioner. In other words, the defendants have complete liberty to produce before the matrimonial court all such witnesses, documents, experts, and other evidence, as they deem neces-

sary or opportune, in order to refute and disprove the witnesses, experts, documents, and other proofs adduced by the plaintiff. Nay, upon the *defensor matrimonii* devolves not only the right, but the *solemn duty*, to produce all available refutatory evidence, especially where the defendant spouse fails or neglects to do so. To enable the *defensor* and the defendant spouse or spouses to produce their counter-evidence, the moderator or judge of the matrimonial court now appoints a suitable day on which the defence shall produce their proofs before him.

736. On the day appointed the *defensor matrimonii* and the defendant spouse or spouses, or the latter's advocate, produce their witnesses, experts, documents, and all other evidence of whatsoever kind, in the same manner as did the plaintiff, or petitioner for the annulment. In other words, the witnesses named by the defence are cited by the judge or moderator, and upon appearing are sworn, in the presence of the opponent, to tell the truth, then examined separately, also on cross-questions put by the petitioner. Likewise, the documents produced by the defence are submitted to the inspection of the plaintiff.

737. As the *defensor matrimonii* and the defendant spouse or his advocate were allowed to object to the admission of the petitioner's witnesses, and to submit cross-questions to them, so also is the plaintiff now permitted to object against the admission of the defence's witnesses, and to propose questions to them through the judge. For the position or status of the two parties is the same. Each has the same rights and standing in court as the other.[1] What is granted to one is allowed also to the other, and that in matrimonial causes of nullity as in all other causes.[2] When the defence is through with its evidence, the petitioner can produce new witnesses, documents, etc., in order to rebut the defence's

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[1] Cap. 2 de mut. pet. (ii. 4).

[2] Schulte, Eheproc. p. 83.

proofs. But the last presentation or production of proofs belongs always to the defence.

738. In fact, the defence in matrimonial causes is privileged in a particular manner and given the greatest latitude. Because there is question not merely of the matrimonial rights of the married couple, but also of the stability and sanctity of the marriage itself, and in consequence of the welfare, temporal and spiritual, of the family, and also of civil society, which springs from and is based upon the family. Hence not only the *defensor matrimonii*, but the moderator or judge as well, is bound *ex officio* to seek and produce all proper evidence which tends to support the validity of the marriage under discussion.

739. The aim of the proofs produced by the defence is to show that the marriage in question is valid; that is, to prove, by witnesses, documents, etc., that the diriment impediment which the petitioner asserted and sought to prove does not exist, or rather did not exist between the married couple at the time of the celebration of the marriage. Consequently the whole aim of the defence's evidence should be to show that the witnesses, etc., produced by the petitioner in support of the alleged impediment do not prove, at least conclusively, that the impediment did exist at the time of the marriage; and that even if it had existed between the couple at that time, it has since then been removed, namely, by dispensation in the case of impediments *juris publici*, and by ratification of the consent, express or tacit, in the case of impediments *juris privati*.

740. How this is done by the defence in the case of each particular impediment may be easily inferred from what we have said in speaking of the manner in which the petitioner proves each particular impediment. The mode followed by the petitioner is substantially that which is also to be observed by the defence.[1] Thus, where, for instance, the plaintiff or

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[1] Card. Kutschker, l. c. vol. v. p. 839.

petitioner impugned the marriage because of alleged grave fear, the *defensor* and the defendant spouse should endeavor to prove, by witnesses, etc., that the petitioner did not fully show (*a*) that there was any violence inflicted sufficient to produce grave fear; and (*b*) that even if grave fear had been inflicted, it was inflicted *justly;* or (*c*) that even if grave fear had been justly inflicted, the party thus coerced had ratified the marriage after the cessation of the fear.

CHAPTER VI.

CLOSE OF THE TRIAL, AND PUBLICATION OF THE PROCESS.

ART. I.

CLOSE OF THE TRIAL.

(*Conclusio in causa.*)

741. WHEN the two parties, that is, the petitioner for the annulment of the marriage and the defendant spouse or the *defensor matrimonii*, having produced all their witnesses, documents, and other proofs, declare that they rest, or that they have no further testimony or evidence to offer for or against the validity of the marriage, and when moreover the judge or auditor is himself of opinion that no other proofs are required, he closes the case, or puts an end to the collection or production of evidence.[1] This is called *conclusio in causa*, or the close of the trial so far as the production of proofs is concerned. We shall briefly describe 1° what is meant by the *conclusio in causa* in matrimonial causes; 2° in how many ways it may take place; 3° whether it is necessary; 4° what are its effects; 5° what follows after it.

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[1] S. C. de P. F. Instr. *Causae Matr.* 1884, § 22.

742. Q. What is meant by the *conclusio in causa*, or the close of the process, in matrimonial causes of nullity, and in how many ways can it be made?

A. 1° Simply the act of the petitioner for the annulment of the marriage and of the defendant spouse, and also of the *defensor matrimonii*, declaring that they rest, that is, that they have no further testimony to submit in the case,[1] and thus giving up their right to produce any more evidence, exceptions, or defences.[2]

743. 2° This closing of the taking of evidence can be made in several ways: (*a*) either *expressly*, namely, where the parties declare in express words that they rest; or *tacitly*, that is, where they produce no further evidence, though given ample time and opportunity to do so.[3] (*b*) Unconditionally or conditionally. The parties rest *unconditionally* when they do so without any conditions or restrictions. They rest *conditionally* when they do so under certain conditions or reservations; for instance, when the party resting declares that he rests, on condition that the other party or litigant also rests, or that nothing new crops up, or that no new proofs or instruments are found, etc. This conditional way of closing or resting is the one which the party who closes or rests first will find it prudent to adopt. For he does not know whether his opponent may not produce something which needs refutation or contradiction. Hence he should never close his own lips altogether, before his adversary has also rested or closed absolutely and unconditionally.[4] (*c*) Finally, the parties may rest or close *in whole*, that is, in the entire case, or only *in part*, that is, only in regard to some particular point or incidental question, v.g., the admissibility of a witness or an instrument. The first is called *general* (*conclusio generalis*), because it is

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[1] Can. 11, C. 30, Q. 1.

[2] Cf. Pellegr, Praxis Vicar. p. 165.

[3] De Angelis, l. 2, t. 27, p. 227.

[4] Ib.

resting the entire case; the second is termed particular (*conclusio specialis*), because it is resting only in some particular point.[1]

744. Q. Is a resting by the parties, or a *conclusio in causa*, necessary in matrimonial causes of nullity?

A. The question is tantamount to this one: Is the moderator of the matrimonial court obliged to wait with the closing of the trial, or to defer putting an end to the collection and production of proofs until the *defensor matrimonii*, the defendant spouse, and the petitioner for the annulment have declared that they rest, or have no further testimony or evidence to produce? We answer, this conclusion or resting is required so far as concerns the *defensor matrimonii;* in other words, the moderator should not close the taking of evidence until the *defensor* has declared that he does not deem it necessary to produce any further evidence.[2] But it is not necessary, in the strict sense of the term, so far as the other parties are concerned. For if the parties unduly waste time, and the judge is convinced that there is no need of further evidence, he can and should, *ex officio*, close the taking of evidence, since he can and should cut off all unnecessary delays.

745. We say, *in the strict sense of the term;* for, especially in matrimonial causes of nullity, the widest latitude possible should be given to the parties. In fact, *natural reason* and *equity* demand that the judge shall not proceed to give his decision until he has a full and complete knowledge of all the facts bearing on the case. Now he is regarded as thus fully informed only when the parties themselves declare they have no further evidence they wish to produce.[3] Pope Eleutherius decrees: "Judicantem oportet cuncta rimari . . . nec litigantibus prius velit judex sua sententia obviare,

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[1] De Angelis, p. 228.

[2] S. C. de Prop. Fide, Instr. cit. § 22.

[3] De Angelis, l. 2, t. 27, p. 229.

nisi quando jam peractis omnibus, nihil habeant in questione, quod proponant."[1] It is necessary, therefore, in a broad sense, that the judge should not close the taking of evidence until the petitioner for the annulment and the defendant spouse show either expressly or tacitly that they do not wish to produce any further evidence.

746. However, the *conclusio in causa*, or resting, is made in an entirely *informal* manner, in matrimonial causes of nullity, as in all other causes conducted or tried *modo summario.*[2] A *formal* closing, or a closing made in a *formal* manner, that is, in a set form of words, is required only in *solemn* or *formal* trials, which scarcely ever occur at the present day.

747. Q. What effect has the *conclusio in causa*, or the resting, in matrimonial causes of nullity?

A. As a rule, no further proofs or evidence whatever can be produced by any of the parties after a case is closed. This is in fact necessary. Otherwise litigations would become endless and immortal. We say, as a *rule ;* since for just causes and for reasons of equity the judge may allow additional witnesses and other evidence to be produced, even after the close of the case.[3] This applies especially to matrimonial causes of nullity,[4] lest marriages validly contracted may be wrongly declared invalid by the ecclesiastical judge.[5] Documents, letters, or other papers may especially be presented *at all times* to the matrimonial court.[6] Of course, it applies also where one of the litigants has, in resting his case, expressly reserved the right to produce additional evidence should it become known to him afterwards.

748. We observe that, *so far as the judge himself is concerned*, there is no *conclusio in causa*. Hence, by the general

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[1] Can. 11, C. 30, Q. 5.

[2] Clem. *Saepe* 2, de V. S.

[3] Innoc. III. cap. *Pastoralis* 5, de causa poss. (ii. 12).

[4] Cap.35, de test. (ii. 20).

[5] De Angelis, l. c. p. 231.

[6] Instr. S. C. cit. § 18.

law of the Church, he can, even after the parties rest, institute *ex officio* further investigations, admit additional proofs, or order the parties to produce new evidence. For the law gives him the fullest right to investigate the whole case before he passes sentence.[1] We say, *by the general law;* for the lawful customs and practices on this head of the various ecclesiastical tribunals in the different parts of christendom should be observed.[2]

After the taking of evidence is closed, the entire process is communicated to the parties, as we shall explain in the following article.

ART. II.

MANIFESTATION OF THE ENTIRE ACTS AND PROCEEDINGS OF THE TRIAL TO BOTH PARTIES.

(*Publicatio processus.*)

749. After the evidence on both sides is all in, and the taking of evidence is closed, the entire proceedings are manifested to both parties, so that they may be able to prepare their summing up. We shall here inquire: 1° What is meant by the *publicatio processus* in matrimonial causes of nullity? 2° How is it made? 3° Is it necessary in the causes under discussion? 4° What is its object and effect?

750. Q. What is meant by the *publicatio processus* in matrimonial causes of nullity?

A. It means the making known or manifesting to both parties—that is, to the petitioner for the annulment of the marriage and to the defendant spouse—all the judicial proceedings which have taken place, and all the evidence which has been submitted on both sides.[3] We say *all the proceedings*, etc.; that is, the entire process, or all that is extant in the records of the trial. Consequently the *publicatio processus* in matrimonial causes of nullity means the making known to both parties the minutes of the entire proceedings, the rulings of the judge, all the evidence submitted on both sides, namely, the names and depositions of all the witnesses, documents or papers, etc. For all these form part of the *processus.*[1] We say also, *to the petitioner and the defendant spouse.* For the *defensor matrimonii* has free access at all times to the acts of the proceedings, and therefore is not in need of any particular and separate permission to inspect them at the present time or after the close of the production of evidence.

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[1] Can. 35, C. 30, Q. 5.

[2] De Angelis, l. c. p. 231.

[3] Cf. Leur. For. Eccl. l. 2, t. 20, Q. 654; Pellegr. p. 147.

751. Q. How is the above publication made?

A. The manner in which the publication is to be made in matrimonial causes of nullity, also with us, is as follows: 1° The judge or moderator of the matrimonial court issues a decree, signed by himself, the *defensor matrimonii*, and the secretary,[2] ordering the acts and proceedings to be communicated to both parties. The decree may read as follows: "Episcopalis curia N., ejusque vicarius generalis, vel auditor seu moderator N., processum in causa nullitatis matrimonii inter N. et N., aperuit et publicavit, et pro publicato haberi voluit et mandavit, et copiam volentibus fieri possit."[3]

2° This decree is read or published in a regular session of the court, in the presence of both parties or their advocates, or in their absence if they are contumaciously absent.[4] Hence the parties should be cited to be present.[5]

3° By virtue of this decree the parties or their advocates are entitled to be informed of the entire process. Consequently, after the decree is published, the whole process, as explained, is to be made known to them or their advocates, either by giving them, at their expense, a copy of all the minutes, acts, etc., or by simply giving them, under due precautions against any possible falsifying or purloining of papers, evidence, etc., full and free access, at the secretary's office, to all the records and proofs, etc., extant in the curia, and by allowing them there to examine them, or also to copy them, in whole or in part, as they may desire. The latter mode is evidently the more convenient, and is the one laid down for criminal and disciplinary causes of ecclesiastics, also in this country.[1]

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[1] Cf. Leur. For. Eccl. l. 2, t. 1, n. 28.

[2] Instr. S. C. de P. F. cit. § 22.

[3] Pellegr. l. c. p. 149.

[4] Cf. Pellegr. p. 148, n. 37.

[5] Cf. Our Elements, vol. ii. n. 857.

752. Q. Is the above publication necessary in matrimonial causes of nullity, also with us?

A. Yes. Thus the S. C. de P. F., Instr. *Causae Matr.* 1884, decrees under art. 22: "Quatenus vero actorum moderatori aut defensori matrimonii nulla alia probatio requirenda videatur, finis imponatur probationum collectioni, *et processus publicetur* edito hac super re decreto ab ipso moderatore, a defensore matrimonii, et a cancellario subscribendo."[2] This is in harmony with the general law of the Church, which provides that in all trials whatever evidence is submitted by one party shall be communicated to the other, and *vice versa*, so that the opponent may be able to reply.[3] In this sense the necessity of publishing the evidence to the parties also in matrimonial causes of nullity is based upon the natural law which grants the right of defending one's self. For how can a person defend himself or his rights and interests unless he knows fully what the opponent has alleged and attempted to prove against him?

753. Q. What is the chief aim and effect of this publication?

A. 1° The main object of the complete publication of the evidence at the close of the trial is to enable the parties, or rather their advocates, to make a thorough summing up or review of the whole case, and of all the proofs submitted on both sides.[1]

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[1] S. C. de P. F. Instr. *Cum Magnopere*, 1884, § 32.

[2] Cf. Pellegr. p. 148, n. 38.

[3] Arg. cap. 29, 30, 31, 35 de test. (ii. 20).

2° The principal effect of this publication is that, like the resting or *conclusio in causa*, it precludes the taking or producing of additional evidence except (*a*) where the right of doing so has been expressly reserved; (*b*) where new or additional evidence becomes known to the party only after the publication; (*c*) where a reasonable excuse or cause is given.[2] This holds particularly with regard to witnesses. For *instruments* can in all causes be presented even after the publication.[3]

754. The rule that no additional evidence is to be received after the publication of the process does not apply strictly to matrimonial causes of nullity. For in these causes testimony can be offered and is to be received even after the publication. Yet there is no doubt that the evidence should all, as far as known, be produced or collected before the *conclusio* and the *publicatio*. Thus the S. C. de P. F. expressly states, in its Instruction, art. 22: "Quatenus vero actorum moderatori aut defensori matrimonii *nulla alia probatio requirenda viedatur*, finis imponatur probationum collectioni, et processus publicetur." Hence evidence offered, also in matrimonial causes of nullity, after the resting and after the publication of the whole process, is open to the suspicion of collusion and of falsehood.

755. *Observation.* — Besides this *complete* publication, which takes place *at the close* of the whole trial, there are various *partial* publications which occur already *during* the course of the trial, and at different stages of it. Thus the *libellus* for the annulment of the marriage is to be communicated and therefore published to the defendant spouse, at or before the contestation of the marriage. Again, when all the witnesses for the petitioner have been heard, their

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[1] Pellegr. p. 148, n. 34. [2] Cap. 31 de test. [3] Cap. 9 de fide instr. (ii. 22).

depositions should at once be made known, v.g., by the *defensor matrimonii*, at least in a general way, to the defendant spouse, so that he or she may produce refutatory witnesses.[1] In like manner, after the witnesses for the defence have been heard, their depositions should be communicated, in a general way, to the petitioner for the annulment, so as to enable him to produce rebuttal witnesses. We say *in a general way*. For the judge should always bear in mind that in matrimonial causes of nullity he should be very careful not to give the spouses any opportunity of conspiring together, or of entering into collusion with each other, for the purpose of having their marriage declared invalid.

CHAPTER VII.

THE SUMMING UP.

(*Defensiones, allegationes in jure et in facto.*)

Art. I.

IMPORTANCE OF THE FINAL SUMMING UP.

756. After the publication of the entire evidence and acts, as above described, follows the summing up or review of the evidence by the parties, or rather by their advocates. Thus the Instruction *Causae Matr.* 1884, says, under article 23: "Publicato processu, locus fiet defensionibus quas partes ad sua jura tuenda voluerint allegare," etc. We observe here, in passing, that the above term, *defensionibus*, as applied to this stage of the proceedings, does not, as we have shown elsewhere,[2] mean the production of additional proofs, even for the defence, but the final summing up, or review of the evidence already collected.

757. It is scarcely necessary to say that the summing up is of great importance, also in matrimonial causes of nullity.

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[1] Leur. For. Eccl. l. 2, t. 20, Q. 656.

[2] Our New Procedure, n. 397, 416.

In fact, the decision of a case depends, not unfrequently, in a great measure on a clear, able, and exhaustive summing up. It requires a thorough knowledge, not merely of the evidence submitted on both sides, but also of the law of the Church concerning the nature, admissibility, force, and application of canonical evidence. Hence it can be properly made only by an advocate, or by one learned in the law of the Church.

758. The Instruction, therefore, briefly and wisely enacts that the parties—that is, the petitioner for the annulment of the marriage and the defendant spouse—shall have the right to select any competent advocates they choose to make this summing up for them. The words of the Instruction[1] are: "Facta iisdem facultate adhibendi *eos defensores quos maluerint;* imo praemonendae erunt de hoc jure, ut sententia lata, injustae contra eam incusationi aut reclamationi aditus praecludatur."

759. The words of the Instruction *eos defensores quos matuerint*, are general and comprehensive, and would appear to include Catholic *lay* advocates, who are well versed in the law of the Church.

We shall now briefly inquire: 1° What is meant by the summing up? 2° What is its object? 3° Is the judge obliged to allow a summing up in matrimonial causes of nullity? 4° In what order do the parties sum up? 5° How is it to be made?

ART. II.

CHARACTER, AIM, ETC., OF THE SUMMING UP.

760. Q. What is meant by the summing up in matrimonial causes of nullity?

A. 1° To sum up in matrimonial causes of nullity means to show how the proofs produced during the trial, and viewed in the light of the law of the Church, prove or disprove the alleged invalidity of the marriage which is being contested. We say *prove or disprove, etc.;* because our definition applies to the summing up of both the petitioner for the annulment of the marriage, and of the defendant spouse, and also of the *defensor matrimonii.*[1] We say also, *viewed in the light of the law of the Church.* For in summing up it is the advocate's duty to show what significance, weight, and bearing the law of the Church gives to the individual proofs—v.g., to the witnesses, documents, etc., produced during the trial, and now being reviewed by him ; how each proof possesses the legal requisites, or is destitute of them.

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[1] *Causae Matr.* § 23.

2° The aim of the summing up is to demonstrate to the judge that the evidence adduced during the trial, as reviewed in the light of the law, proves or disproves the validity of the marriage under discussion.

761. Q. Have the parties a right to sum up in matrimonial causes of nullity ?

A. Yes. The Instruction[2] gives the parties the full right to make the summing up, both orally and in writing. The judge should not only allow them to do so, but should, if they fail to do so, either through ignorance or carelessness remind them of their rights in the matter.[3] Of course, the judge should listen patiently and attentively to the oral summing up, and sedulously also peruse the written one. He should carefully refrain from manifesting his feelings during the oral summing up.[4]

ART. III.

ORDER AND MANNER OF SUMMING UP.

762. Q. In what order or succession do the parties sum up ?

A. The petitioner for the annulment of the marriage, or his advocate, sums up first; and his written summing up is to be communicated to the defendant spouse or his advocate, to enable him to reply to it. Next the advocate for the defendant spouse sums up. The written discourses of both the petitioner and defendant spouse are then given to the *defensor matrimonii*, so that he may, in his summing up, refute the arguments brought against the validity of the marriage.[1] The parties can reply to the summing up of the *defensor vinculi*, and the latter again to the former. The *defensor matrimonii* has always the last word. The judge may cut off needless replies or summaries.[2]

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[1] Cf. Pellegr. l. c. p. 167, n. 2.

[2] *Causae Matr.* § 23.

[3] Instr. cit. § 23.

[4] Pellegr. l. c. p. 168, n. 9.

This order or succession of making the summing up is based on the general rule of canon law, that the judicial acts of the plaintiff-petitioner for the annulment are to precede those of the defendant.[3]

763. Q. How is the summing up to be made?

A. The manner in which the summing up, whether of the petitioner for the annulment, or of the defendant spouse, or of the *defensor matrimonii*, is to be made, suggests itself by its very aim. The object of the summing up, as we have said, is to convince the judge or moderator that the evidence produced during the trial fully and canonically proves the respective positions or claims of the parties who make the summing up. Thus the aim of the summing up of the petitioner for the annulment, or his advocate, is to demonstrate to the judge that the evidence produced fully proves the diriment impediment, and consequently the invalidity of the marriage under consideration. For this purpose he should carefully go over the entire evidence submitted on both sides; weigh its every feature most attentively; note sedulously every point of advantage to his client, and of disadvantage to his opponent. And in every instance he should endeavor to bring the law of the Church to bear out and support his arguments, reasoning, and deductions.

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[1] Instr. *Causae Matr.* § 23.

[2] Gasparri, l. c. n. 1199.

[3] Pellegr. l. c. p. 167, n. 5.

764. In order to do all this with order and clearness, he should divide his summing up, oral and written, into different distinct heads corresponding to the different salient points of the controversy.[1] Under each of these different heads of his discourse he should group and enumerate those proofs which have been produced in support of the respective heading or point; and he should show how these proofs fully and canonically prove the respective particular point or head. He should also, under each head, review the evidence produced by the opponent concerning it, and show that it has not weakened or overthrown his client's position.[2]

765. We will illustrate our meaning. Suppose a marriage is being contested because of alleged *grave fear*. In order to make out his case, the advocate for the petitioner, in summing up, should divide his discourse, written and oral, into the following heads, namely: 1° Violence was really done, v.g., threats, whipping, etc., were suffered by the spouse, and caused fear; 2° these acts of violence were of a *grave* character, and consequently the fear produced by them was *serious;* 3° the violence offered and the fear produced by it were *unjust;* 4° the acts of violence were inflicted by a *third* person; 5° in order to induce the spouse to marry the other spouse.

766. The advocate should then discuss each of these heads or points separately; and under each of them he should review the proofs, of whatever kind, adduced during the trial and bearing on that particular head or point, and show how these proofs, thus grouped properly, demonstrate fully and canonically the respective head or point under which they are grouped.[3]

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[1] Pellegr. l. c. p. 167, n. 6.

[2] Our Elements, vol. ii. n. 1134.

[3] Schulte, Ehepr. pp. 190, 191.

767. The advocate for the defendant spouse should, in his summing up, pursue a similar course. He should, for instance, in the above case of the alleged impediment of violence and fear (*impedimentum vis et metus*) divide his discourse or argument into the following heads: 1° There was in reality no violence inflicted; 2° if there was, it was light and trivial, not grave; 3° even if there had been acts of violence, and that of a grave character, they were *justly* inflicted; 4° they were not inflicted for the purpose of inducing the party to consent to the marriage, but for some other reason; 5° the party suffering from the fear has condoned the violence, either expressly or tacitly, and has thus ratified the marriage. He should then discuss these points separately, and show how the proofs produced during the trial, both by the plaintiff and by the defendant, demonstrate their correctness and truth.[1]

CHAPTER VIII.

THE SENTENCE.

768. AFTER the advocates of the two parties and the *defensor matrimonii* have finished their summing up, the next step is the pronouncing of the final sentence. Consequently the judge or moderator appointed by the bishop, having carefully weighed the entire evidence and the summing up of both parties, pronounces his decision declaring the marriage to be either valid or invalid. This is, of course, the most important act of the entire procedure. In fact, all the acts of the trial which have hitherto taken place have had no other object in view than to enable the judge to come to a just decision on the controverted marriage. We shall therefore briefly inquire: 1° What is meant by the sentence

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[1] Cf. Instr. Austr. § 176.

in matrimonial causes of nullity; 2° what should be its contents and form; 3° how should it be rendered and delivered to the parties?

ART. I.

NATURE AND CONTENTS OF THE SENTENCE.

769. Q. What is meant by the sentence or decision in matrimonial causes of nullity?

A. It is the act of the judge or moderator, by which he defines and announces, in the manner prescribed by law, that the marriage in the case is either valid or invalid, and thus puts an end to the controversy or dispute concerning the validity of the marriage which was attacked. We say, *defines that the marriage is either valid*, etc.; for in matrimonial causes, as in all other causes, the sentence must not leave any doubt on the controverted matter, but must clearly, distinctly, and unequivocally decide for or against the validity of the marriage. An equivocal or doubtful decision, which leaves the disputed matter in doubt, is invalid. We say also, *in the manner prescribed by law;* for if the judge neglects to observe the formalities prescribed by the law of the Church, v.g., if he does not write out the sentence, his sentence is invalid. We say, finally, *and thus puts an end to the controversy.* Because the effect of a decision, also in matrimonial causes, if not reversed on appeal, is to end the whole cause or dispute, and oblige the parties to obey it.

770. Q. What should be the contents and form of the sentence in matrimonial causes of nullity?

A. The sentence (we speak here of final, not of interlocutory sentences or decisions) should consist of three parts, viz., the introductory, the dispositive, and the concluding.[1] The *introduction* should state (*a*) the name of the judge, and whether he is an ordinary or a delegated judge; (*b*) the names of the litigants, and which of them is respectively the petitioner for the annulment of the marriage and the defendant spouse, and who is the *defensor matrimonii;* (*c*) the state of the question, or the subject-matter of the controversy, namely, the diriment impediment as set forth and affirmed by the petitioner and denied by the defendant spouse or by the *defensor matrimonii;* (*d*) whether both contending parties were present during the trial, or whether one of them was absent contumaciously; (*e*) whether the main or substantial parts of the trial, as prescribed by law, took place, so that it may appear that the trial was conducted in the manner prescribed by the law of the Church. Hence it is customary for the judge to formulate his decision as follows: "Viso libello, visis litis contestatione, testium depositionibus, et aliis hujus generis, merita seu substantiam causae respicientibus, visisque videndis," etc.[1]

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[1] Card. Kutschker, l. c. vol. v. p. 924.

771. The *dispositive* part of the sentence (so called, because it *disposes of* or *regulates* the whole controversy) should give the decision on the controverted marriage, and the reasons upon which it is based. The decision should state clearly and unequivocally that the marriage is declared either valid or invalid.[2] The grounds upon which the decision rests should be set forth clearly and fully, though without any unnecessary length or superfluous detail. Thus the S. C. de Prop. Fide[3] says: "Haec (sententia) in scriptis erit exaranda, in eaque rationum momenta, quibus innititur, ex processu deprompta exponantur, succincte quidem, sed ita tamen, ne quidpiam essentiale omittatur."

772. All the main or substantial grounds for the decision should therefore be given in full, and should be taken from the canonical proofs submitted during the

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[1] Pellegr. l. c. p. 175, n. 21.
[2] Card. Kutschker, l. c. pp. 925, 926.
[3] Instr. *Causae Matr.* § 24.

trial—*ex processu deprompta.* For the judge cannot base his decision on private, personal, or extrajudicial information, but solely on the information and proofs adduced during the trial. He must decide *secundum allegata et probata in judicio.* The judge should therefore, in his decision, review in detail the various points of the controversy, and the evidence offered on both sides, and show how, according to the law of the Church, they prove or disprove the validity of the marriage in the case.

773. Moreover, the judge should so frame his decision as to include and settle all the points of the controversy.[1] Hence he will do well to pursue in his decision a course similar to that of the advocates in their summing up. That is, he should divide his decision into various separate heads corresponding to the different points of the controversy. Thus, where there is question of the invalidity of the marriage because of alleged fear and violence, he should, if he decides that the impediment has been proved, and that the marriage is consequently invalid, show in his decision, under separate heads, that according to the evidence it has been proved, 1° that the violence was really inflicted; 2° that it was *serious;* 3° that it was inflicted *unjustly;* 4° for the purpose of compelling the party to contract the marriage; 5° that no ratification, express or tacit, of the compulsory marriage has occurred. Under each of these heads he should enumerate the proofs supporting them. He should also discuss the evidence which militates against his decision and refute it.

774. From all this it will be seen that in preparing and writing out his decision the judge should use great diligence, and should go over the entire evidence of both sides and their summing up. He should weigh it all impartially, and in the light of the law of the Church. If, in going thus

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[1] Pellegr. l. c. p. 173, n. 4.

over the evidence, he finds that some important link in the chain of evidence is missing, having been overlooked during the trial, and that he needs further light, he can, even now, order new evidence to be taken, so that he may be able to give a full and just decision on all points of the controversy.

775. Besides reviewing the whole evidence in preparing his decision, the judge should also,[1] especially in matrimonial causes of nullity, consult two or three persons, learned in the law of the Church, particularly in regard to marriage procedure. He should for that purpose submit to them the entire acts of the case, and hear their opinion on them. Thus the S. C. de Prop. Fide[2] decrees: "Omnibus ut supra peractis, ad sententiam pronunciandam veniendum erit. Quod ut ab Ordinario seu ejus delegato rite fiat . . . *integra causa duobus aut tribus viris peritis, si haberi possint, examinanda subjiciatur, et nonnisi audito eorum voto sententia proferatur.*"

776. Finally, the *end* of the sentence is made up of the signature of the judge and of the secretary, of the date, that is, of the day, month, and year when, and of the place where, it was pronounced. This dating and signing may be worded thus: "Given at ———, on the 6th day of May, 1892. (Signed) N. N., Judge. N. N., Secretary."

The S. C. de Prop. Fide[3] expressly requires that the sentence in matrimonial causes of nullity shall be signed by the judge and the secretary, and have affixed to it the seal of the episcopal curia.

Art. II.

THE PRONOUNCING AND DELIVERING OF THE SENTENCE.

777. Q. How should the sentence be pronounced and made known to the parties, also in matrimonial causes of nullity?

A. Sentences in criminal and disciplinary causes of ecclesiastics, and also in ecclesiastical civil causes other than matrimonial, are (*a*) to be read by the judge from his manuscript; (*b*) in a regular session of the court; and (*c*) in the presence of both the contending parties, (*d*) who must consequently be cited to be present; (*e*) it must, of course, be pronounced at the time and place mentioned in the citation of the parties.[1] Are these formalities also required in matrimonial causes of nullity? The sentence is certainly to be drawn up *in writing*.[2] But the S. C. de Prop. Fide says nothing about its being pronounced orally and in the presence of the parties. It says merely: "Sententia subscriptione judicis et secretarii, necnon sigillo curiae episcopalis munita partibus erit notificanda per curiae apparitorem, relicta iisdem illius exemplari, de quo in scripto fides erit facienda."[3] We think therefore that the judge is free to do either; that is, he can either read the judgment in the presence of the parties, as above described,[4] or he can publish it to the parties by simply sending them a copy of it.[5] Besides, the sentence should not be pronounced or dated in a sacred place, v.g., a church, nor on Sundays or holidays of obligation.

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[1] Pellegr. l. c. p. 176, n. 29. [2] Instr. *Causae Matr.* § 24. [3] Instr. cit. § 24.

778. Q. Whether and how the sentence is to be communicated to the parties?

A. 1° The sentence must be made known or delivered to the parties, that is, both to the petitioner for the annulment of the marriage and to the defendant spouse and to the *defensor matrimonii*. Thus the S. C. de Prop. Fide[6] enacts: "*Sententia . . . partibus erit notificanda* per curiae apparitorem, relicta iisdem illius exemplari, de quo in scriptis fides erit facienda."

2° The sentence is delivered to the parties by a messenger of the court, or by the parish priest, or some other trustworthy person, who shall give them a copy and take a receipt for its delivery. But if they live too far away, it may be sent to them by registered mail; and if they live outside the diocese, it may be handed to them by the ecclesiastical authorities of the place where they live.[1] Of course, it is always preferable to send the sentence to the parties by a priest or other qualified person, who will explain it to them and advise them properly in regard to its contents. The receipt of the delivery is to be filed among the acts of the cause, and the date and manner of delivery of the sentence are to be recorded in the minutes of the proceedings.[2]

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[1] Cf. München, vol. i. p. 205.

[2] S. C. de P. F. Instr. cit. § 24.

[3] Ib.; cf. Instr. Austr. § 195.

[4] Card. Kutschker, vol. v. p. 935.

[5] Card. Kutschker, vol. v. p. 936; Schulte, Ehepr. p. 192.

[6] Instr. cit. § 24.

ART. III.

OF RES JUDICATA IN MATRIMONIAL CAUSES OF NULLITY.

§ 1. *In General.*

779. A final sentence against which no appeal has been interposed within the prescribed time becomes *res judicata.* But if an appeal has been lodged within the proper time, it does not pass into *res judicata* pending the appeal. We shall here inquire (*a*) what is meant by *res judicata*, and what are its effects; (*b*) whether and how a final judicial sentence in matrimonial causes of nullity can become *res judicata.*

780. Q. What is meant by *res judicata*, and what are its force and effects?

A. 1° By *res judicata* is meant nothing else than the final sentence itself, *from which no appeal has been made within ten days after it has been communicated to the parties.*[3] It is to be observed that the sentence becomes *res judicata* the very moment the ten days allowed for appealing have elapsed, and no appeal has been interposed.[4]

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[1] Schulte, Ehepr. pp. 56, 57. [2] Ib. p. 58. [3] Santi, l. 2, t. 27, n. 12.

[4] Innoc. III. cap. 15 de sent. et re jud. (ii. 27); Leur. For. Eccl. lib. 2, t. 27, Q. 966.

781. 2° When a sentence has passed into *res judicata*, it ends the judicial controversy, acquires such force and authority that it must be regarded as truth, can no longer be reversed, and proofs to the contrary, even though newly discovered, cannot be received against it. Consequently a sentence which has become *res judicata* has the presumption *juris et de jure* in its favor.[1] In other words, *in foro externo*, the law of the Church presumes absolutely, and in such a manner as not to admit any proof to the contrary, that when no appeal has been interposed within the requisite time, the sentence is just, and that the parties,[2] if they felt aggrieved by it, have waived their rights and grievances.[3]

782. 3° A second effect, flowing, as is evident, from the above, of *res judicata* is, (*a*) that the sentence can now be carried into effect or be executed, (*b*) and that even when its execution is delayed, the rights of the victorious party accruing from it do not perish, except by the lapse of a very long period of time, v.g., 30 or 40 years.[4]

§ 2. *In Matrimonial Causes of Nullity.*

783. Q. Whether and how a sentence in matrimonial causes of nullity passes into *res judicata ?*

A. 1° A sentence in matrimonial causes of nullity never passes into *res judicata*, even though no appeal has been made against it within the prescribed time.[5] Hence it can be reversed at any time, even after 30 or 40 years, as soon as it is found that the marriage has been wrongly declared valid or invalid.[6] This holds, whether the sentence has been *against* or *for* the validity of the marriage contracted. Nay, the judge is bound to reverse the sentence *ex officio* in the case, also when the parties are unwilling to have it reversed. The reason is that the sentence in matrimonial causes of nullity involves the rights not merely of the litigants, but also of the marriage itself. Consequently the presumption of law that the parties who do not appeal renounce their rights does not apply to the rights of the marriage considered in itself, which are entirely independent of the rights of the parties. Again, a marriage which has been validly contracted is indissoluble *jure divino*, and is therefore, when erroneously declared invalid by the ecclesiastical judge, not dissolved by such decision.

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[1] Cap. 13 de sent. et re jud. (ii. 27).

[2] Cap. 15 eod.; Santi, l. c. n. 13.

[3] Leur. l. c. Q. 965.

[4] Santi, l. c. n. 14.

[5] Cap. 7, 10, 11 de sent. et re jud. (ii. 27).

[6] S. C. de P. F. Instr. *Causae Matr.* § 30.

784. Consequently if a sentence pronouncing a marriage valid or invalid could become *res judicata* and could not be reversed, even after its incorrectness had been proved, it would follow (*a*) that the parties would have to live together as husband and wife, even though it had been established that they were not validly married, or (*b*) that they could dissolve the marriage and marry a second time, even though it were proved that their first marriage was perfectly valid. Now the rule of law is that when a sentence becomes the occasion of sin it can never pass into *res judicata*. From all this it will be seen that matrimonial causes differ in this respect from other ecclesiastical causes.

785. 2° On the other hand, it follows from this same rule of law, that when the sentence in matrimonial causes of nullity can be executed without becoming the occasion of sin, it can pass into *res judicata*. Of this we shall give two instances. Thus, first, although the sentence by which the marriage is declared valid or invalid, and by which the succumbing party is condemned to pay the costs of the trial or process, does not pass into *res judicata*, so far as concerns the validity or invalidity of the marriage, it nevertheless becomes *res judicata*, when not appealed from within ten days, *so far as concerns the expenses;* and hence the latter are to be paid, or when already paid, are not to be refunded, if afterwards the sentence is found to be wrong in regard to the

validity or invalidity of the marriage. For the payment of the expenses is not sinful.[1]

786. A second instance is, where one of the married couple petitions for the annulment of the marriage because of an alleged diriment impediment *juris privati*, v.g., error, fear and violence, etc., but succumbs and does not appeal within ten days from the sentence sustaining the validity of the marriage. In this case the sentence becomes *res judicata*, even with regard to the validity of the marriage. Why? Because in the case of impediments *juris privati* the sentence sustaining the validity of the marriage does not nourish or occasion sin, since the spouse who suffered fear, or was deceived, etc., can himself correct this defect, by consenting freely and knowingly. Hence if he does not appeal within the time prescribed, the law presumes *juris et de jure* that, not having objected when he could and should have done so, he has ratified the defect.[2]

787. For the rest, it should be observed that while in the case of impediments *juris publici* the sentence in matrimonial causes of nullity never passes into *res judicata*, as has been said, yet when no appeal has been interposed within ten days, or when the appeal, though interposed, is afterwards abandoned,[3] the law presumes (though not *juris et de jure*) that the sentence in the case is just, and that the process or trial was legitimate; nay, so great an authority and weight does the sentence acquire in the case from the non-appeal or desertion of the appeal, that it cannot be afterwards reconsidered and reversed by way of an appeal—since an appeal is no longer admissible—but only by way of simple *recourse* (*recursus*), which should be addressed to the judge of the first instance, or to the Pope or his delegate, but not to the Metropolitan.[4] For

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[1] Leur. l. c.; Mansella, p. 213.

[2] Leur. l. c.; Mansella, l. c.

[3] Cap. 4, 5 de appell. (ii. 28).

[4] Leur. For. Eccl. l. 2, t. 27, Q. 968, n. 2.

the Metropolitan acquires jurisdiction, in the case of an appeal or complaint of nullity, but not of a simple recourse.[1]

788. In this way only, that is, only by way of a simple recourse or request for a rehearing or reinstatement, can and should the party impugning the sentence in matrimonial causes of nullity, after the lapse of ten days allowed for appealing, be heard again, provided, however, he states a probable cause of the alleged injustice of the sentence.[2] Hence also, before reopening the case and retrying it, the judge should institute a summary inquiry in order to ascertain whether the cause alleged for impugning the sentence is just. Moreover, the impugner of the sentence must present a new *libellus* or petition to the judge, praying that the matrimonial cause already decided may be tried again, and that the former sentence be revoked on account of its being based on errors newly discovered. The judge in admitting the recourse, and in reopening or retrying the case, should not, however, say, "Contra sententiam te restituimus," for, as a matter of fact, the sentence never passed into *res judicata*. But he should say, "restituimus te ad audientiam,[3] id est, ut perinde audiaris sicut audiri poteras ante latam sententiam."[4]

CHAPTER IX.

REMEDIES AGAINST UNJUST SENTENCES IN MATRIMONIAL CAUSES OF NULLITY.

ART. I.

GENERAL REMARKS.—UNJUST AND INVALID SENTENCES.

789. EVERY man may err.[5] Consequently every ecclesiastical judge is liable to error in his decisions in matrimonial causes of nullity as well as in other causes pertaining

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[1] Mansella, p. 214.

[2] S. C. de P. F. Instr. *Causae Matr.* § 30.

[3] Cap. 4 de in integr. rest. (i. 41).

[4] Leur. l. c. n. 2.

[5] Ps. cxv.

to the ecclesiastical forum. He may pronounce a marriage valid which in reality is invalid; and, *vice versa,* he may decide that a marriage is invalid which is perfectly valid He may be led into giving such a wrong decision either because he allows himself to be swayed by his feelings and prejudices rather than by the evidence; or because he lacks the requisite judicial knowledge and experience; or because he was deceived by evidence which appeared to be good, but was false; or because the litigants, owing to ignorance or negligence, failed to produce proper evidence before him. Thus the judge may, either with or without his own fault, give a wrong decision, and inflict a grievance or injustice upon the contending parties, also in matrimonial causes. For it is plain that to declare a marriage invalid which is in reality valid, or *vice versa,* would be to inflict a grievance upon the husband or wife against whom the decision militates.

790. Against a wrong or unjust sentence thus inflicted in matrimonial causes of nullity the law of the Church gives the party aggrieved by the sentence the following remedies, to wit: 1° The appeal; 2° the complaint of nullity; 3° the simple recourse, or quasi reinstatement. When and how one or the other of these three remedies is to be employed by the aggrieved party, also in matrimonial causes of nullity, will depend upon the nature of the grievance or wrong alleged to have been inflicted by the sentence. If the grievance comes from an *unjust* sentence, the remedy against it is the appeal; if from an *invalid* sentence, the remedy is the complaint of nullity (*querela nullitatis*); if from the fact that neither of these two remedies can be employed, and that nevertheless there exists evidence which was not submitted during the trial or was discovered only afterwards, then the simple recourse (*recursus*) or quasi reinstatement is the proper remedy.

791. In order to enable the reader to understand the

above properly, we shall explain the difference between an *unjust* and an *invalid* sentence in matrimonial causes of nullity. The sentence is invalid in matrimonial causes of nullity, chiefly, either because it has been given by a judge who is not competent, or some essential formality of the trial has been omitted, v.g., when the *defensor matrimonii* has not been called to the proceedings. The sentence is *unjust* in these causes when it is contrary to the facts in the case, that is, when it decides that a diriment impediment exists where in reality none exists, and *vice versa.*

792. From this it will be seen that a sentence, in the causes under discussion, may be valid *in foro externo* and yet unjust. Thus a marriage which is perfectly valid may yet be declared invalid by the ecclesiastical judge *in due form of law.* All the substantial formalities may have been scrupulously observed during the trial. But the evidence was false; the witnesses were perjured, etc. Likewise, a sentence may be invalid and yet just, namely, when the judge omits a substantial formality during the trial, but yet decides in accordance with the facts. We shall now treat separately of each of the above three remedies.

ART. II.

APPEALS.

793. We shall here briefly discuss: 1° What is an appeal in matrimonial causes of nullity; 2° by whom and how can it be interposed; 3° to whom is it to be made; 4° what are its effects; 5° mode of procedure to be observed.

§ 1. *Nature of Appeals.*

794. Q. What is meant by an appeal, in ecclesiastical causes in general?

A. An appeal, as applied to ecclesiastical causes in general, is usually defined by canonists to be the calling upon the superior judge for redress against an injury either already inflicted or about to be inflicted by the inferior judge.[1] While this is the usual definition given by canonists, and applies to judicial and extrajudicial appeals, it does not appear to us to be a complete one, nor to distinguish appeals from the other means of redress, v.g., simple recourse, reinstatement, *querela nullitatis.* We shall therefore define an appeal proper, judicial or extrajudicial, "to be the demand addressed to the superior judge or prelate in the legal manner, and with certain definite legal effects, to redress a grievance either already inflicted or about to be inflicted by the inferior judge or prelate."

795. We say, *demand;* because the appeal is a *right*, not a *favor.* Herein the appeal differs from a simple recourse (*recursus*). The latter is a *request* or *humble supplication* for the redress, since outside of matrimonial causes of nullity it is granted, not as a right, but merely as a *favor.*[2] We also say, *to the superior judge;* for the appeal always goes from the inferior to the superior, namely, from the bishop to the metropolitan, and from the latter to the Holy See, whereas the recourse must be made either to the same judge who inflicted the injury or to the Supreme Pontiff, and cannot be made to the metropolitan. We say again, *in the legal manner*, v.g., within ten days, etc.; whereas in the recourse, or complaint of nullity, or reinstatement, a simpler mode of procedure and fewer formalities are observed. Finally, we say, *with certain definite legal effects;* these are, v.g., to devolve the cause to the higher judge (*effectus devolutivus*), and frequently also to suspend the execution of the sentence (*effectus suspensivus*). Herein also appeals differ especially from a mere recourse, which does not legally produce such effects, although the Pontiff to whom recourse is had may, and

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[1] "Appellatio est ab inferiori ad superiorem judicem provocatio facta ratione illati vel inferendi gravaminis." (Schmalzg. l. 2, t. 28, n. 1.)

[2] Our New Procedure, n. 432.

usually does, as an act of clemency, examine the recourse, and if need be afford the desired relief or redress.

796. Q. What is meant by an appeal in matrimonial causes of nullity?

A. It is the demand addressed to the superior judge, in the legal manner, and with certain definite legal effects, to redress the grievance inflicted by an inferior judge in deciding upon the validity or invalidity of a marriage already contracted. We say, *in deciding*. By this we mean, not merely final decisions in matrimonial causes of nullity, but also interlocutory decisions, which are equivalent to final decisions, or inflict an irreparable grievance. What these interlocutory decisions are in matrimonial causes of nullity can easily be inferred from our *Elements of Ecclesiastical Law*, vol. ii. n. 1156, 1159, 1160, 1161. We say, *the grievance inflicted by the judge*. It should be observed that the grievance may be imposed by the judge unintentionally, and therefore without any fault of his.

§ 2. *Who can Appeal? How often?*

797. Q. Whether, by whom, and how often can appeals be made in matrimonial causes of nullity?

A. 1° That it is allowed to appeal in matrimonial causes of nullity as well as in other causes, and that no matter whether the decision is for or against the validity of the marriage, is beyond doubt, and is clearly and expressly stated in law as also in force among us.[1] Nay, except in the cases to be stated further on, the *defensor matrimonii* not only can, but is strictly obliged to appeal until the marriage has been twice declared invalid.[2] In fact, the right of appeal is granted by the very law of nature as a remedy or means of redress against a wrong or injustice inflicted wittingly or unwittingly by a judge or superior, both in matrimonial causes of nullity and in other causes.

[1] S. C. de P. F. Instr. *Causae Matr.* §§ 25, 30.

[2] Ib.

798. 2° The rule is, that those persons and only those who are affected, whether directly or indirectly, by the decision, can appeal. Hence the following persons can appeal: (*a*) the petitioner for the annulment of the marriage, at least when he is not the fiscal procurator acting *ex officio;* (*b*) the defendant spouse or spouses;[1] (*c*) the *defensor matrimonii*, as representative of the interests of the marriage bond itself. As we have said, he not only can but must appeal under certain circumstances. (*d*) All other persons who are indirectly affected by the decision, and feel themselves aggrieved by it.[2] We have said, *the petitioner, . . . at least when he is not the fiscal procurator*, etc. Here the question may be asked, Can the fiscal procurator, acting as petitioner for the annulment of the marriage, where the curia proceeds *ex officio* against its validity,[3] appeal against the sentence which declares the marriage valid? Schulte[4] holds the affirmative; Card. Kutschker[5] the negative. Card. Kutschker's opinion seems based on the fact that the fiscal procurator represents and acts for the curia, and that the curia cannot appeal against itself. Of course, the above parties, with the exception of the *defensor matrimonii*, *may* but *need* not appeal, since nobody is, as a rule, obliged to make use of his rights.

799. 3° As to how often appeals can be made in matrimonial causes of nullity, the rule is the same in matrimonial causes of nullity as in other causes. Consequently each of the contending parties can appeal until *three sentences* of the same tenor (*tres sententiae conformes*) have been pronounced against him, in the same cause.[6] In other words, it is allowed

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[1] Of course, persons who have the right to appeal can appeal either in person or through their advocates and procurators. (Schulte, Eheproc. p. 201.)

[2] Can. *Non solent*, C. 2, Q. 6.

[3] We have seen that the curia not only can, but sometimes should, proceed *ex officio* against a marriage. (S. C. de P. F. Instr. cit. § 3.)

[4] Eheproc. p. 200.

[5] Eher. vol. v. p. 961.

[6] Our New Procedure, n. 445, 446.

to appeal *twice*, but not oftener, in the same matrimonial cause of nullity. Thus the person who petitions that the marriage shall be declared invalid can appeal from the ordinary to the metropolitan, then from the metropolitan to the Holy See,[1] in case the first and second instances pronounce the marriage to be valid.[2]

800. Likewise the spouse who defends the marriage as valid may appeal from the ordinary to the metropolitan; then from the metropolitan to the Holy See (that is, with us, to the S. C. de Prop. Fide), in case the first and second instances declare that the marriage is not valid. Nay, in this case the *defensor matrimonii must*, save in the instances to be given later on, appeal from the ordinary when he pronounces the marriage to be invalid; and if upon such appeal the metropolitan also pronounces the marriage invalid, he may acquiesce, although he may appeal also to the Holy See. And only after the marriage has been declared invalid three times is he obliged to acquiesce.

801. However, although it is not allowed to appeal a third time in the same matrimonial cause of nullity, yet it is lawful, as we shall see, at any time after the third adverse sentence, to supplicate the ordinary by whom the cause was first tried and decided, or the Holy See, for a reopening or new trial of the cause, provided it is shown that new evidence has been found.

802. From the above it will be seen that appeals in matrimonial causes of nullity agree in some respects; v.g., as to the number of times of appealing—with appeals in other causes; and that they differ in other respects, v.g., as to the *obligation* incumbent on the *defensor* of appealing.

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[1] S. C. de P. F. Instr. *Causae Matr.* § 30.

[2] The Instr Austr. §§ 179, 180, does not allow of any further appeal, when the sentence in the first and second instances has declared the marriage to be valid. Hence in this particular the Instr. Austr. differs from the Instr. of the S. C. de P. F., as above quoted. (Cf. Phillip, Comp. § 280; Schulte, l. c. p. 199.)

803. Down to the year 1889, the law of the Church was, that when the sentence in the first instance was against the validity of the marriage, the *defensor matrimonii* was bound to appeal against it,[1] even where the spouses acquiesced in the decision and even where the nullity of the marriage was absolutely evident and certain. This rule was the occasion of no slight inconvenience. Hence the S. C. S. Officii, on June 3, 1889, issued the following decree, approved by the Supreme Pontiff: "Quando agitur de impedimento disparitatis cultus, et evidenter constat unam partem esse baptizatam, et alteram non fuisse baptizatam; quando agitur de impedimento ligaminis, et certo constat primum conjugem esse legitimum et adhuc vivere; quando denique agitur de consanguinitate aut affinitate ex copula licita, aut etiam de cognatione spirituali, vel de impedimento clandestinitatis in locis ubi decretum Tridentinum *Tametsi* publicatum est, vel uti tale diu observatum, dummodo *ex certo et authentico documento*, vel in hujus defectu, ex *certis argumentis* evidenter constet de existentia hujusmodi impedimentorum ecclesiae auctoritate nondispensatorum, hisce in casibus, praetermissis solemnitatibus in constitutione apostolica *Dei Miseratione* requisitis,[2] matrimonium poterit ab Ordinariis declarari nullum, cum interventu tamen defensoris vinculi matrimonialis, *quin opus sit secunda sententia*."[3]

804. Consequently, when there is question of the invalidity of a marriage already contracted, owing to alleged *disparitas cultus*, or *ligamen*, or consanguinity, or affinity *ex copula licita*, or spiritual relationship from baptism and confirmation, or clandestinity in places where the Tridentine decree *Tametsi*

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[1] In case the decision was given in the first instance by one of the Sacred Congregations in Rome, the Roman *defensor matrimonii* is bound to ask the Congregation for a new hearing. (Bened. XIV. Const. *Dei Miser.* § 14.)

[2] Hence in these cases the formal trial laid down in the Instr. *Causae Matr.* need not be observed, also with us, though the *defensor matrimonii* has to intervene.

[3] Apud Gasparri, l. c. n. 1201.

obtains, it is no longer obligatory upon the *defensor matrimonii* to appeal against the decision pronouncing the marriage invalid, provided, however, it is *clearly evident and certain* that the alleged impediment exists, and that therefore the marriage is invalid. If in these cases any reasonable doubt remains with regard to the existence of the impediment, the *defensor matrimonii* is obliged to appeal against the sentence declaring the marriage to be invalid. It is plain, therefore, that in this sense the Instr. *Causae Matrimoniales,* § 25, has been modified by the above decree of the S. C. S. O.

§ 3. *Effects of the Appeal.*

805. Q. What effects does an appeal produce in matrimonial causes of nullity?

A. The appeal in matrimonial causes of nullity always produces both a devolutive and a suspensive effect, no matter whether the appeal is from the first or from the second instance, that is, from the ordinary or from the metropolitan. In other words, the appeal, (*a*) *devolves* the entire cause upon the judge to whom the case has been appealed, and the latter requires, *ipso facto*, power to try and decide the cause; (*b*) and also *suspends* the execution of the sentence of the judge *a quo.*[1] Hence when the marriage has been declared invalid in the first or second instance, neither of the married couple can pass to a new marriage pending the appeal which has been interposed by the defendant spouse or by the *defensor matrimonii.*[2] Nay, where the marriage is pronounced invalid in the first instance, the married couple cannot pass to a new marriage even when, owing to the malice, collusion, or negligence of the *defensor matrimonii* and the defendant spouse or spouses, no appeal has been lodged, but they must wait until the marriage has been declared invalid a second time by the judge *ad quem.*[1]

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[1] Schulte, Eheproc. pp. 198, 199, 201.

[2] Bened. XIV. Const. *Dei Miseratione,* §§ 9, 11.

806. The above teaching relative to the suspensive effect of appeals in matrimonial causes of nullity is thus set forth in the Instr. of the S. C. de Prop. Fide[2]: "Judex (in prima instantia) si . . . matrimonium nullum fuisse decreverit, quamvis conjuges judicio praelati acquieverint, defensor matrimonii appellationem facere debebit. . . . *Interim nullatenus permittetur partibus novas nuptias inire.*[3] . . . Si porro in secunda aeque ac in prima sententia nullum atque irritum matrimonium judicatum fuerit, et ab ea . . . vel altera pars appellaverit, vel defensor matrimonii ei acquiescendum non putet . . . re tota ad S. Sedem delata, *interim firma remaneat utrique conjugi prohibitio ad alias transeundi nuptias.*"[4] If the married couple nevertheless contract a new marriage, pending an appeal, as above stated, they become guilty of *attentates* against the appeal, and are to be forbidden to live in the new marriage, and also to be punished with all the other penalties decreed by the law of the Church against polygamists and bigamists.[5]

807. The ecclesiastical penalties of polygamy or bigamy, as still in force, are, chiefly: 1° Infamy of law.[6] 2° Bigamists become suspected of heresy. 3° If bigamists consummate the marriage entered into by them in bad faith, they contract the impediment of crime, and therefore cannot, without a dispensation, marry each other, even after the first marriage has become extinct by the death of the first spouse. 4° Moreover, bigamists are regarded as public sinners, giving great scandal. Hence they are to be deprived of the sacraments of the Church, until they amend and cease to be bigamists; if they die in bigamy, Christian burial must be re-

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[1] Bened. XIV. Const. *Dei Miseratione*, § 9.

[2] Instr. *Causae Matr.* § 25. [3] Ib. § 25. [4] Ib. § 30.

[5] Bened. XIV. Const. cit. § 9.

[6] L. *Praetoris* ff. de iis qui infam. not.; cap. 4 de bigam. non ord.

fused to them. Their children, moreover, are looked upon as illegitimate, and should be so noted in the baptismal register.[1]

808. Q. To whom is the appeal to be made in matrimonial causes of nullity?

A. Here also the same rule holds as in other causes. Consequently, as a rule, the appeal is to be made to the *next higher* judge. Hence, also with us, appeals from the Bishop or his Vicar-general should be made to the metropolitan. With us, by special concession of the Holy See, when the metropolitan acts as judge of the *first instance*, namely, in matrimonial causes of *his own diocese*, the appeal lies to the next nearest metropolitan. From the metropolitan, acting as judge of the second instance, the appeal should be made to the Holy See (with us, to the S. C. de Prop. Fide). We say, as a rule; for it is always allowed to appeal *directly* to the Holy See. Our answer is thus clearly stated by the S. C. de Prop. Fide:[2] "Ordo appellationis erit prout sequitur. Si prima sententia a curia episcopali lata fuerit, appellatio fiet ad curiam Metropolitanam; si vero a curia Metropolitana ea prodierit, appellabitur ad curiam Metropolitanam viciniorem. Ad S. Sedem appellatio erit semper facienda, quoties primae duae sententiae inter se conformes non fuerint, nisi partibus placuerit causam ad ipsam S. Sedem ab initio et immediate deferre."

§ 4. *Interposition of Appeals before the Judge "a quo."*

809. We have seen what appeals are in matrimonial causes of nullity, by whom they can be made, and what are their effects. We shall now touch upon the manner in which they are made and adjudicated. An appeal, also in matrimonial causes of nullity, has three principal stages, viz.: (*a*) the making of the appeal, that is, the declaration made

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[1] Gasparri, l. c. n. 632.

[2] Instr. cit. § 26.

by the appellant that he appeals; (*b*) the bringing of the appeal before the higher judge; (*c*) the trial and adjudication of the cause appealed by the judge to whom the appeal has been made. We shall treat of each of these points separately.

810. Q. Within what time and before whom is the appeal to be made in matrimonial causes of nullity?

A. Both the litigants, that is, both the petitioner for the annulment of the marriage and the defendant spouse, must make their respective appeals (*a*) before the judge *a quo*, (*b*) within ten days from the time they have received official notification of the sentence. We say, *before the judge "a quo*," that is, before the ordinary who has given the decision from which an appeal is lodged. The object is, that the judge being thus duly informed of the appeal, may send all the acts of the cause to the judge of appeal, and meanwhile suspend the execution of his sentence.

811. We also say, *within ten days*, etc.; this is inferable from the Const. *Dei Miseratione* of Pope Benedict XIV.,[1] which clearly implies and intimates that the appeal has to be interposed within ten days, or *intra legitima tempora*, that is, within the time prescribed by the law of the Church for making appeals. The "Instr. Austriaca,"[2] commended by the *Third Plenary Council of Baltimore*, expressly decrees: "Appellatio (in causis matrimonialibus) apud tribunal, contra cujus sententiam directa est, *intra decem a sententia communicata dies*, annuntianda venit." These ten days are called *dies fatales*, because if allowed to go by without an appeal they extinguish or become fatal to the appeal.[3] Consequently, if the petitioner for the annulment or the defendant spouse fails to appeal within ten days, he or she loses the right to appeal, though not the right to move the *querela nullitatis*, or to ask for quasi reinstatement.

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[1] Arts. 8, 9. [2] Art. 102. [3] Card. Kutschker, l. c. vol. v. p. 964.
[4] Schulte, Ehepr. p. 202.

812. We have also said, in our answer, *the litigants, that is, both the petitioner or plaintiff and the defendant spouse.* For this rule does not apply to the *defensor matrimonii.*[1] For him alone there are no *dies fatales* within which he is to interpose the appeal. Thus the S. C. de P. F. says:[2] "Quamvis appellationi interponendae, nulli fatales dies vinculi defensori statuti sint, curandum tamen ut quantocius id fiat." However, he should, as the latter part of the above Instruction says, make the appeal as soon as possible—"curandum tamen ut quantocius id fiat." For matrimonial causes should always be adjudicated with as much expedition as possible. Hence if the *defensor matrimonii* defers making the appeal beyond a reasonable time, he is to be compelled to appeal or to resign, or he is to be removed. Thus the S. C. de Prop. Fide[3] decrees: "Quod si defensor ipse hoc munus neglexerit, compelli ad id poterit vel a suo episcopo, vel etiam ab illo, apud quem de jure appellatio esset facienda." From the above it will be seen that, except in the case of the *defensor matrimonii*, the time for interposing appeals is the same in matrimonial causes of nullity as in other causes.

813. Q. How is the appeal to be announced before the judge *a quo* in matrimonial causes of nullity?

A. 1° As in other causes, so also in matrimonial causes of nullity, the appeal from a final decision or from an interlocutory one having the force of, or equivalent to, a final decision, can be made *viva voce*, provided it is interposed before the judge *a quo*, during the very session of the court in which the final sentence is pronounced.[4] If made in this manner, it is to be recorded among the minutes of the proceedings by the secretary, which record will serve as proof of its having been interposed.[1] When the appeal is interposed afterwards, it must be made *in writing*.[2] This teaching is thus clearly expressed in law: "Si quis ipso die, inter acta, voce appellaverit, hoc ei sufficit; sin autem hoc non fecerit, ad libellos appellatorios dandos biduum vel triduum (nunc decem dies) computandum est."[3]

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[1] Schulte, Eheproc. p. 202; Kutschker, l. c.

[2] Instr. *Causae Matr.* § 25; Instr. Austr. § 184.

[3] Instr. cit. § 25.

[4] This supposes that the parties have been cited and are present in court when the sentence is being pronounced.

2° As to the import or tenor of the appeal, it is enough, also in matrimonial causes of nullity, in appealing from a final sentence, or from an interlocutory sentence which is equivalent to a final sentence, to say merely, "I appeal."[4] No reasons whatever need be given for the appeal. In fact, it would be useless to assign the reasons. For the judge *a quo* cannot take cognizance of them. The case is different with interlocutory decisions which are not equivalent to final sentences. The judge *a quo* can correct them himself. Hence the appellant should mention the reasons of the appeal in this case, so that the judge *a quo* may himself afford the desired redress.

814. Q. When do the ten days granted for appealing begin to run in matrimonial causes of nullity?

A. From the time the appellant has received official notification of the sentence, and an authentic copy of it, through the person appointed by the curia.[5] Consequently, the ten days are not computed from the day the sentence was pronounced, but from the day the official notice of it was served on the parties.

§ 5. *Introduction of the Appeal before the Judge "ad quem."*

815. After the appeal has been interposed within ten days, the next step is to bring it before the judge *ad quem*,

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[1] München, Kan. Gerichtsfer. vol. i. p. 530. [2] Our New Procedure, p. 205.

[3] L. 5, ff. de appell. (49, 1).

[4] "Sed si apud acta quis appellaverit, satis erit, si dicat, *appello*." (L. 2, ff. de appell. 49, 1.)

[5] Cf. Instr. S. C. de P. F. cit. § 24.

or before the judge to whom the appeal has been made. We shall now see how this is done, and what are the duties of the appellate curia.

816. Q. How is the appeal against a final sentence in matrimonial causes of nullity brought or introduced before the judge *ad quem?*

A. The answer is contained in article 27, Instr. *Causae Matrimoniales*, of the S. C. de Prop. Fide, which is as follows: "Facta appellatione, episcopus seu Ordinarius qui primam sententiam tulit, eam remittere debebit una cum integro processu, caeterisque omnibus ad causam iterum judicandum pertinentibus, ad tribunal ad quod appellatum est." Consequently the appeal is officially brought before the judge *ad quem* by the forwarding to him, on the part of the judge *a quo*, of all the acts and records of the process. The Instruction does not enjoin that the *originals* shall be sent; and therefore leaves the judge *a quo* free to forward the originals or merely copies of them. The Instr. Austr. enacts that only copies of the acts shall be sent.

817. Here, then, it will be seen that the procedure marked out by the Instruction of the S. C. de Prop. Fide differs somewhat from the older discipline of the Church, as laid down in the decretals. According to the latter, the appellant was obliged to ask the judge *a quo* for the *apostoli*, and that within thirty days, on pain of forfeiting the right to prosecute his appeal. And the judge *a quo* was bound to give the appellant the *apostoli* or certificate of appeal, and also a copy of all the acts of the cause, which the appellant himself forwarded to the judge *ad quem*. Instead of all this, the above Instruction, like the Instr. *Cum Magnopere*, simply enacts that the judge *a quo* shall himself forward to the judge *ad quem* all the acts of the cause, thus doing away with the obligation of asking for or giving the *apostoli*.[1]

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[1] Cf. our New Procedure, n. 497–500.

818. Q. What are the rights and duties of the judge *ad quem*, after receiving the acts, etc., of the cause?

A. Upon receiving from the judge *a quo* the acts of the cause, as above stated, the judge to whom the appeal has been made has a twofold duty to perform: one relates to the admissibility of the appeal; the other, to the cause itself which has been appealed.[1] In other words, he should first inquire whether the appeal has been made with the requisite legal formalities, namely, whether it has been made by the proper person, within the ten days, etc. Of course, when the *defensor matrimonii* makes the appeal this part of the inquiry does not take place. Next, when he finds that the appeal has been made with the prescribed formalities, he should formally accept the appeal, and then proceed to examine into the merits of the whole matrimonial cause appealed to him in the manner to be described in the next article.[2]

819. Here it will be seen that the procedure in question laid down for matrimonial causes of nullity by the S. C. de Prop. Fide[3] differs in some respects from that contained in the Instr. *Cum Magnopere* of the same S. Congregation, which latter instruction outlines the procedure to be followed in hearing and deciding criminal and disciplinary causes of ecclesiastics. The Instr. *Cum Magnopere* enacts, (*a*) that the judge *ad quem*, having received the acts of the case from the judge *a quo*, shall notify the appellant that he must appoint an advocate, within the peremptory term of thirty days, to conduct and prosecute the appeal;[4] (*b*) that if the appellant fails to present his advocate within the said peremptory term of thirty days, he will be regarded as having given up his appeal, and accordingly the judge *ad quem* will declare it extinct.[5]

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[1] Glossa in cap. *Romana* 3, de appell. in 6°, in casum.

[2] München, l. c. vol. i. p. 550.

[3] Instr. *Causae Matr.* §§ 27, 28.

[4] Instr. *Cum Magnopere*, § 39.

[5] Ib. § 40.

820. All this is omitted in the Instruction *Causae Matrimoniales*, which outlines the procedure to be followed in matrimonial causes of nullity in this country.

§ 6. *Procedure before the Metropolitan.*

821. The appeal in matrimonial causes of nullity from the court of the first instance is made either directly to the Holy See, or first to the metropolitan and then to the Holy See. We shall now separately discuss the mode of procedure before these two different appellate tribunals. We begin with the metropolitan court.

822. When the metropolitan has received the acts of the cause from the judge *a quo*, and has ascertained, by an inspection of these acts, that the appeal is in form, that is, has been interposed (*a*) by the proper person, (*b*) and within ten days, as above stated, he shall accept the appeal, and then notify the appellant either directly, or through the judge *a quo*, of this acceptance, and direct him to prosecute his appeal. Likewise he should inform the judge *a quo* of the acceptance of the appeal.

823. The first step which is now to be taken is that the appellant, either personally or through his advocate, shall, in obedience to the above directions of the metropolitan, present to him a full written statement or outline of the motives and reasons upon which he bases his appeal, or his claim that the sentence was wrong, unjust, or invalid.[1] This statement is then communicated to the appellee by the metropolitan or his auditor for rejoinder. After receiving the appellee's answer to the appellant's statement, the metropolitan or his auditor communicates both papers to the *defensor matrimonii*, of his own matrimonial curia, for his comments on them. The statement of the appellant,

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[1] The appellant may in this statement refer to the acts of the cause for proof of his alleged grievances, or also offer to produce new proofs.

reply of the appellee, and observations of the metropolitan *defensor matrimonii* constitute the *contestatio appellationis*, or the *litis contestatio, so far as concerns the appeal or the grievances on which the appeal is based*, but not so far as concerns the merits of the cause itself appealed.[1] For as to the cause itself, the contestation took place already in the first instance, and need, therefore, not be repeated in the second instance.

824. The metropolitan next proceeds to the hearing of the cause appealed. Consequently he now issues a citation to the appellant and to the appellee, notifying them that he will proceed to the hearing or trial of the cause appealed on the day and at the place named in the citation, and summoning them to be present. On the day appointed the proceedings are opened by the metropolitan or his matrimonial auditor in the presence of both parties, of the metropolitan *defensor matrimonii*, and of a secretary who takes down the minutes of the proceedings. At this first or opening session of the appellate court the appellant and appellee can interpose both dilatory and peremptory exceptions.[2] Thus the appellee can object to the appellate court as incompetent or suspected of partiality ; or he can object that the appeal has not been interposed, v.g., within ten days,[3] etc. Moreover, at this first session the written statement of the appellant, giving the causes of his appeal, is communicated to the appellee for his answer, unless this has already been done beforehand, as above stated.

825. Thereupon the metropolitan or his auditor fixes a day on which both parties, and also the metropolitan *defensor matrimonii*, must successively produce before him the proofs, such as witnesses, documents, etc., which they desire to present in addition to those already produced by them in

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[1] München, l. c. vol. i. p. 556.

[2] L. 4, C. de temp. app. (7, 63).

[3] Pellegr. l. c. p. 272.

the first instance. This term or delay is called *terminus ad non posita ponendum, et non probata probandum.*[1]

826. If neither the appellant nor the appellee nor the *defensor matrimonii* of the metropolitan curia, to whom all the acts of the cause are to be communicated beforehand, wishes to submit additional evidence within the term assigned, but is content with simply referring to the acts of the case for proof of his statements, or of the justice or injustice of the sentence passed in the first instance, and if the metropolitan judge himself, after carefully looking over the acts and papers of the case, does not deem it necessary to collect any further evidence, the hearing or trial of the cause in the appellate court will consist simply in the careful examination and review of the acts of the cause, that is, of the procedure, proofs, etc., of the first instance.

827. But if the parties or the metropolitan *defensor matrimonii* desire to produce additional evidence, as they have a full right to do,[2] or if the appellate judge himself deems it necessary to obtain further evidence in order to clear up doubts,[3] supply defects, and correct errors of the first trial, the procedure is as follows: On the day appointed *ad non posita ponendum*, that is, on the day fixed for the taking of additional evidence, the production of proofs takes place in the same manner as during the trial in the first instance. Thus the spouses and witnesses are examined before the metropolitan or his auditor under oath, one by one, or separately, in the presence of the *defensor*

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[1] Cf. our New Procedure, n. 536.

[2] L. 4 cit. C. de temp. app. (7, 63).

[3] For, as in other causes, so also in matrimonial causes of nullity, the appellate judge, like the judge of the first instance, can and should collect *ex officio*, where necessary, all the evidence which he needs, in order to be able to understand fully the merits of the case and to pass a just sentence. This applies particularly to matrimonial causes of nullity. For the judge is *ex officio* bound to protect a valid marriage, and to annul an invalid one.

matrimonii and of a secretary, who writes down the depositions.

828. When both parties have finished presenting their additional evidence, and the *defensor matrimonii*, upon being expressly asked by the judge, declares that he has no further evidence to submit,[1] the metropolitan then assigns a day for the publication of all the additional evidence and proceedings to both parties, giving them either a copy of the whole appellate process or full access at the secretary's office to all the acts and papers. This is called *terminus ad publicationem*, and resembles the publication in the first instance.

829. After this he assigns to both parties a day for *summing up* the entire appellate proceedings, in law and in fact —*terminus ad allegandum in jure et in facto.* The summing up may be made both orally and in writing, as we have seen in speaking of the summing up in the first instance.

830. Lastly, the appellate judge, after carefully and conscientiously reviewing all the evidence produced, both in the first instance and in the second, and after submitting the entire cause to several persons versed in the law of the Church, and hearing their opinions on it, pronounces his sentence in the same manner as the judge did in the first instance.[2]

831. From the above, then, it will be seen that the metropolitan or his auditor proceeds as follows in adjudicating appeals in matrimonial causes of nullity. First, he appoints a day and place for the first or opening session of the appellate court, and summons both parties to be present. Next he appoints a day for the production of additional evidence by both parties. Third, he closes the case and publishes the proceedings to all the parties. Then the summing up takes place. Lastly, he pronounces sentence and communicates it to the parties.[3]

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[1] S. C. de P. F. Instr. *Causae Matr.* § 29. [2] Ib.

[3] Cf. Pellegr. l. c. p. 271, § 4, n. 1.

§ 7. *Procedure before the S. C. de Prop. Fide.*

832. From the sentence of the metropolitan curia, acting as appellate judge, it is allowed to appeal, also in matrimonial causes of nullity, to the higher ecclesiastical tribunal. If the sentence in the first and second instances sustains the validity of the marriage, and militates against the petitioner for its annulment, the latter may appeal also against the second decision, or that rendered by the metropolitan curia. Consequently in matrimonial causes of nullity the same rule obtains as in other causes, civil or criminal, viz., that it is allowed to appeal *twice*, and therefore until *three uniform* decisions have been rendered. On this head the Instruction of the S. C. de Prop. Fide[1] differs from the Austrian Instruction. The latter (§§ 178, 180) enacts that when the marriage has been twice declared valid the cause is ended, and the petitioner for its annulment cannot appeal again. The Instruction of the S. C. de Prop. Fide (§ 30) expressly decrees that the petitioner for the annulment can appeal to the Holy See, even where the marriage has twice been declared valid.

833. Where, on the contrary, the decision both in the first and second instance is against the validity of the marriage, and therefore against the defendant spouse and the *defensor matrimonii*, the defendant spouse or the *defensor matrimonii* may of course also appeal against the second decision, or that given by the metropolitan, according to the rule above stated, that both plaintiff and defendant have the right to appeal *twice* in the same cause, or until *three* uniform sentences have been pronounced against them. But if the defendant spouse, or the *defensor matrimonii* does not lodge an appeal in the case, the cause is finished, and the parties can pass to a new marriage. If, on the contrary, either the *defensor matrimonii* or the defendant spouse makes an appeal

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[1] *Causae Matr.* § 30.

against the decision of the metropolitan declaring the marriage invalid, the husband and wife cannot contract a new marriage pending the appeal.

834. The appeal from the metropolitan curia, acting as an appellate court, goes to the next higher ecclesiastical tribunal, which, with us, is the S. C. de Prop. Fide, there being no intermediate ecclesiastical authority with us between the metropolitan and the Holy See. In the Oriental churches the Patriarch possesses jurisdiction over metropolitans, and consequently forms an intermediate appellate court between metropolitans and the Holy See.

835. Q. What are the rules to be followed, also with us, in appealing to the S. C. de Prop. Fide, in matrimonial causes of nullity?

A. 1° The appellant, whether he be the petitioner for the annulment of the marriage or the defendant spouse, is obliged, under pain of forfeiting the appeal, to inform the metropolitan curia that he appeals to the S. C. de Prop. Fide, within ten days from the time he has received official notification of the sentence. However, this rule does not, as we have already said, apply to the *defensor matrimonii*, for whom alone there are no *dies fatales* within which he is bound to make the appeal and notify the metropolitan of it. Yet he should interpose the appeal as soon as possible. Nay, the spirit of the law is that he should interpose it within ten days, as above, unless he has good and legitimate reasons for putting it off longer.

2° The metropolitan curia, being thus informed of the appeal to the Holy See against its decision, shall, without delay, forward to the S. C. de Prop. Fide all the acts of the cause, namely, the acts and minutes of the trial, the summing up, and the sentence.

836. Q. How does the S. C. de Prop. Fide proceed in adjudicating matrimonial causes of nullity appealed to it?

A. Upon being informed of the appeal interposed to the

Holy See, the metropolitan should, as we have said, send all the acts of the cause to the S. C. de Prop. Fide. The appellant should also, on his own part, introduce his appeal before the S. Congregation in a short writing, in which he sets forth the main facts of the case, and the grounds of the appeal. This *libellus appellationis* may be sent directly to the Cardinal Prefect of the Propaganda, and that by mail, or it may be presented at the office of the Secretary of the Propaganda by a Roman advocate, or by some other worthy person. The appellant therefore from the United States will do well to appoint, from the very beginning, some trustworthy person or able advocate residing in Rome and familiar with affairs there to present and conduct his appeal.

837. When the Sacred Congregation has received all the above papers, and finds upon examining them that the acts of the cause, as forwarded by the metropolitan, are not sufficiently complete, that is, that the facts in the case have not been fully and properly sifted during the process or trial in the first or second instance, and that consequently further testimony or information is needed, it writes to the metropolitan from whom the appeal was made, and requests him to institute the requisite additional proceedings and then forward the additional acts to Rome. Then the case is given to a consultor, as we shall explain presently.

838. But when it is found that the acts of the cause are complete, and that no additional information is needed, the Cardinal Prefect, or the Secretary in the name of the Cardinal Prefect, designates one of the consultors of the Sacred Congregation who is an able *theologian*[1] to examine all the papers or acts of the cause carefully, and to hand in a written report or opinion setting forth at length and in full the facts, arguments, and proofs contained in the acts of the case, and his deductions and conclusions therefrom.

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[1] Sometimes the whole Sacred Congregation itself designates the consultor or consultors who are to report on a cause.

839. Next, all the papers of the cause are given to another consultor who is a *canonist*, and who, like the previous consultor, goes over all the documents carefully and thoroughly, and makes an extended written report of the cause, stating the facts, the arguments of both sides, and his own opinion and deductions, which may of course differ from the views of the parties. The parties, that is, the appellant and appellee, can, as we have said, appoint Roman advocates to look after their interests. These advocates also write out a full summing up, in law and in fact, of the whole cause, in favor of their respective clients. All these papers, together with the acts of the cause, are then sent to the Roman *defensor matrimonii*, who on his part makes a written summing up of the case in favor of the validity of the marriage. The opinions of the consultors, the deductions of the advocates and of the *defensor matrimonii*, are then printed and handed to the Secretary of the Congregation about thirty days prior to the day fixed for the general meeting of the Cardinals of the Sacred Congregation in which the cause is to be decided.

840. Thereupon the Secretary of the Sacred Congregation draws up a written impartial report of the cause, setting forth the facts and the legal deductions, both for and against the cause, without however expressing any personal opinion, or showing any preference for either side. This report is also printed. About ten days before the general session of the Sacred Congregation all the above printed opinions, deductions, and reports are sent by the Secretary to each Cardinal who is a member of the Sacred Congregation and who resides at Rome, so as to enable him to study all the papers beforehand, and thus come to the meeting fully prepared to give his vote on the cause.

841. After all these preparatory stages have been gone through, the cause is at last ready to be brought up, discussed, and decided in the full session of the Cardinals who

are members of the S. Congr. de Prop. Fide. These general sessions or meetings are usually held once a month, generally on the first Monday of every month, at the Palace of the Propaganda.[1] Each Cardinal receives notice of the meeting several days in advance by a sealed letter from the Cardinal Prefect designating the time and place of the meeting. This letter, together with the papers of the various causes to be decided, is delivered to him by a messenger of the Sacred Congregation.

842. On the day appointed the Cardinals meet at the Palace of the Propaganda, around a large table covered with a green cloth. The Cardinal Prefect, or in his absence the senior Cardinal present, presides,[2] and introduces the subjects and causes to be discussed and decided. The Secretary sits at one end of the table, and writes down the main points discussed and decided; he does not speak at the meeting. As a rule, a number of causes and matters are discussed and decided at each monthly meeting.[3] Each cause is discussed separately by all the Cardinals present, in the order of their seniority as Cardinals. Each Cardinal, from the senior Cardinal down to the one created last, discusses the cause and then gives his vote. The main arguments of the discussion and the votes given are recorded by the Secretary. After one cause has been disposed of, the next one is taken up and similarly adjudicated.

843. After the session is over, the Secretary writes out a faithful resumé of the discussion and vote, stating the names of the Cardinals who voted for or against the cause, and the main reasons advanced by each in support of his vote. The Secretary of the Propaganda has a weekly audience with the

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[1] Sometimes two or even three meetings take place every month, when urgent circumstances so demand.

[2] According to some writers, the meeting is presided over, never by the Cardinal Prefect, but always by the senior Cardinal present. (Grimaldi, p. 148.)

[3] In the S. C. C. no less than seven or ten causes are proposed and decided at each monthly meeting of the Cardinals.

Pope—usually every Sunday evening—in which he presents the record of the session and the decisions reached, for the confirmation of the Pontiff.

844. Sometimes the Cardinals find that the evidence is incomplete. Then they postpone action on the case, and instruct the *defensor matrimonii* to draw up a statement showing what information is wanted and what legal steps are to be taken. This statement is then sent by the Secretary of the Sacred Congregation to the metropolitan from whose decision the appeal was made, with directions to carry out the prescriptions of the *defensor*, and to forward the result to Rome. When the latter arrives, the case is then taken up again and decided. At times the Cardinals find that the acts of the curia *a qua* are indeed complete, but yet irregular, v.g., where in the trial some essential formalities have been omitted. In this case the Sacred Congregation usually obtains from the Pope the *sanatio actorum*, and then decides the case.

845. Against the decision of the Sacred Congregation there is, of course, no appeal. Yet it is the custom of the Sacred Congregation to grant to the parties a new hearing, if they petition for it. When the decision has been confirmed by the Holy Father the permission to reopen the cause must be given by the Holy Father himself, and is called *aperitio oris*.[1] The new hearing (*beneficium novae audientiae*), if granted, takes place before the same Congregation by which the decision was rendered.

ART. III.

COMPLAINT OF NULLITY.

(*Querela Nullitatis.*)

846. The law of the Church decrees: "*Sentantia contra leges canonesve prolata, licet non sit appellatione suspensa, non*

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[1] Cf. our Elements, vol. ii. n. 1368.

potest subsistere ipso jure."[1] Accordingly it is the unanimous teaching of canonists that the omission of a substantial formality during the trial in matrimonial causes of nullity—v.g., where the *defensor matrimonii* is not cited, or where the citation of the defendant spouse is omitted—*annuls*, and that *ipso jure*, the entire proceedings and the sentence pronounced after such invalid proceedings.[2] That these principles apply also to matrimonial causes of nullity, in this country, is evident from these words of the S. C. de Prop. Fide: "Hic matrimonii defensor a moderatore actorum citandus erit ad quaelibet acta, *ne vitio* NULLITATIS concidant."[3] The Instr. Austr. § 187 also says: "Sententia (in causis matrimonialibus) est *nulla*, si a judice haud competente lata vel actus judicii essentialis aut prorsus omissus, aut quin matrimonii defensor adhiberetur, institutus fuerit."

847. What is meant by the nullity or invalidity of the sentence in the matrimonial causes under consideration? This, that it is not merely illicit and wrong, but moreover *invalid*, that is, *of no effect whatever*. In other words, the sentence has no legal existence whatever, being looked upon by the law as though it had never been pronounced. The law decrees this *nullity* of the proceedings and sentence, both in order to punish the violation of its prescriptions and to prevent them from being violated in future. In fact, the law of the Church lays the greatest possible stress upon the observance of the substantial formalities in the trial or process especially of matrimonial causes involving the validity or invalidity of marriages already contracted. Hence with us, the mode of procedure laid down by the S. C. de Prop. Fide, Instr. *Causae Matrimoniales*, should be carefully observed, lest the entire proceedings and the subsequent sentence be *ipso jure* invalid.

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[1] Gregor. I. cap. 1 de sent. et re jud. (ii. 27).
[2] Pellegr. p. 181, n. 79.
[3] Instr. *Causae Matr.* § 10.

848. Here it is well to note that a sentence, in matrimonial causes of nullity, as in other causes, may be just and yet invalid. This will be the case where the ecclesiastical judge omits, for instance, the citation of the spouse or spouses, or of the *defensor*, but yet rightly pronounces the marriage to be valid or invalid in accordance with the true facts of the case. On the other hand, a sentence in these causes may be unjust, and yet perfectly valid. This will happen, for instance, where the judge scrupulously observes all the requisite formalities during the trial or process, and yet, owing to a wrong estimate of the evidence, pronounces a marriage to be invalid which is really valid, or *vice versa*. The proper remedy, also in matrimonial causes of nullity, against an *unjust* sentence is the *appeal;* against an *invalid* sentence, the complaint of nullity (*querela* or *oppositio nullitatis*).[1]

849. Q. What is the complaint of nullity in the matrimonial causes under consideration?

A. It is the legitimate alleging and proving that the sentence pronounced by an ecclesiastical judge in a matrimonial cause, involving the validity or invalidity of a marriage already contracted, is *ipso jure* null and void. We say, *the legitimate alleging;* because the complaint of nullity is to be made by and to those persons who are pointed out by law—namely, by the persons affected by the sentence, and to the competent ecclesiastical superior. We say also, *and proving;* for it is necessary not merely to *allege*, but also to *show* or *prove*, that the sentence is really null and void. Thus if a spouse claims that he was not cited for trial, and that consequently the trial and sentence are invalid, he is bound to prove that he was not cited. However, we must observe here that in matrimonial causes of nullity the metropolitan, to whom an appeal is made, should also *ex*

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[1] Our New Procedure, n. 567, 568.

officio take note of and correct errors and mistakes involving nullity of sentence made in the first instance.[1] Finally, we say, is "*ipso jure*" *null and void.* Now, as we have seen, a sentence, also in the matrimonial causes in question, is void *ipso jure*[2] chiefly (*a*) when it is pronounced by a judge who is not competent; (*b*) when a substantial formality is omitted during the trial or process.[3]

850. Q. Whether and to whom the complaint of nullity is to be made, also in matrimonial causes of nullity.

A. 1° A sentence which is void *ipso jure* is looked upon by the law of the Church *as not pronounced at all*, and therefore does not in reality bind the parties. Hence the parties can, of their own accord, disregard and disobey an invalid sentence, *provided the nullity is clear and certain beyond any reasonable doubt*. But where there is any *reasonable doubt*, either of law or fact, as to whether the sentence is void or not, the sentence holds good until it is reversed or declared null by the higher ecclesiastical judge. Consequently, in the case of doubt the person affected by the sentence cannot take it upon himself to disregard it of his own accord, but must make the complaint of nullity to the proper ecclesiastical superior and request him to declare the sentence null and void.[4]

851. 2° By custom now everywhere prevalent, and having the force of law, the complaint of nullity of sentence, also in matrimonial causes, is to be made, not to the ordinary or judge who gave the invalid decision, but to the next higher judge, that is, to the judge to whom the appeal, if interposed, would have to be addressed.[5] Thus the Instr. Austr. § 188, speaking of matrimonial causes, decrees: "Nul-

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[1] S. C. de Prop. Fide, Instr. cit. § 28.

[2] Pellegr. l. c. p. 181, n. 79; Reiff. l. 2, t. 28, n. 23.

[3] Our Elements, vol. ii. n. 1357, 1358.

[4] Cf. our Elements, vol. iii. n. 3112, 3113.

[5] Bouix, de Judic. vol. ii. p. 410.

litatis actio . . . coram judice proxime superiori instituenda est."

852. Q. What is the right and duty of the judge *ad quem*, v.g., the metropolitan, when a complaint of nullity is made to him in matrimonial causes of nullity?

A. The Instr. Austr. declares under article 191 that it is his office simply to declare that the sentence is void (if he finds it invalid), and then to remand the cause for a new trial back to the lower court which gave the invalid decision. The words of the Instruction are: "Processus pro nullo declaratus (per judicem proxime superiorem), coram eodem judice (inferiori), aut quando ob competentiae defectum irritatus sit, coram judice, qui competens pronuntiatus, forma debita iterandus est."

853. But the S. C. de Prop. Fide[1] seems to lay down a different rule for this country, and to enact that, with us, the judge *ad quem* has the right and duty both to declare the process and sentence void, and also to proceed to institute a new trial himself, or to supply the omissions and correct the errors of the curia of the first instance. It is true that the S. Congregation speaks of appeals. But if the metropolitan has the right and duty, on appeal, to institute a new trial and to supply substantial omissions, he can certainly also do so in the case of a complaint of nullity. In fact, according to the present discipline of the Church, the complaint of nullity, like the appeal, produces a devolutive and generally also a suspensive effect.

854. Q. Within what time is the complaint of nullity to be made, also in matrimonial causes of nullity?

A. Apart from a particular statute or custom to the contrary, the complaint of nullity can be made at any time within *thirty years* from the date of the sentence,[1] but not beyond that period, as every action is prescribed against by said time.[2] This applies especially to matrimonial causes of nullity, which never pass into *res judicatae.*

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[1] Instr. *Causae Matr.* § 28. The words are: "Tribunal ad quod appellatum est . . . ea omnia peraget, quae necessaria videbuntur, ut defectus suppleantur, dubia elucidentur, et errores corrigantur. Hunc in finem, conjuges examinabit, testes, a quibus novae informationes hauriri possint iterum audiet. Imo poterit etiam praescribere *ut novus processus ex integro conficiatur.*"

855. We have said, *apart from a particular custom or statute.* In fact, in Austria the *querela nullitatis* must be made, like the appeal, within ten days from the time the sentence was communicated to the parties. Thus the Instr. Austr. § 188 says: "Nullitatis actio *intra tempus appellationibus praefixum* . . . instituenda est." No such local custom or statute exists with us. But even where this local custom or statute exists, and where, consequently, the parties cannot make the *querela nullitatis* after the lapse of ten days, they can always, that is, within thirty or forty years or a longer period, demand quasi reinstatement, by which the cause is reopened and tried again, provided, of course, newly-discovered evidence warrants it.

ART. IV.

REINSTATEMENT IN MATRIMONIAL CAUSES OF NULLITY.

(*In integrum restitutio.*)

§ 1. *What is Reinstatement, as applied to Matrimonial Causes of Nullity?*

856. Q. What is here meant by reinstatement?

A. To reinstate a person (*aliquem in integrum restituere*) means, in a broad sense, to restore or bring him back to a former state or condition. In the stricter and canonical sense, in which it is here used, reinstatement means the extraordinary remedy of the law, by which a person who has been grievously injured, whether by a judicial sentence or by an extrajudicial act, is, by reason of natural equity, restored by the judge to that state, right, or condition in which he was before the injury occurred.[1]

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[1] Pellegr. l. c. p. 257, n. 58.

[2] The cap. 6 de Praescript. says: "Quia quadragesimalis (sive 30) praescriptio omnem prorsus actionem excludit." Cf. cap. 3, 4, de Praescript.

857. We say, first, *the extraordinary*, etc.; because recourse can be had to reinstatement only when the ordinary means of redress, namely, appeals and complaint of nullity, are not available. We say, secondly, *remedy of the law;* that is, remedy granted by the law of the Church. We say, thirdly, *grievously injured;* for *de minimis non curat praetor*. We say, fourthly, *whether by a judicial sentence*, etc.; for reinstatement is granted both against judicial sentences and extrajudicial acts or grievances.[2] The aim of the reinstatement is, like that of an appeal, to redress a grievance, whether inflicted judicially or extrajudicially. We speak in this article only of reinstatement against judicial sentences, and that in matrimonial causes of nullity.

858. What then is meant by reinstatement in matrimonial causes of nullity?

A. It is the extraordinary remedy of the law, by which the petitioner for the annulment of the marriage or the defendant spouse, or the marriage itself, which has been seriously injured by a judicial sentence, is restored by the proper ecclesiastical judge, to the condition in which he, she or it was before the sentence was rendered, so far as concerns the hearing of the cause. We say, *extraordinary;* for as in other causes, so also in matrimonial causes of nullity, the order in which redress should be asked against judicial sentences is as follows: First, an appeal should be interposed within ten days; next, where the right of appeal has lapsed, that is, where the appeal has not been interposed within ten days, or where, after having been properly interposed, it is abandoned, there is still the other ordinary remedy called complaint of nullity, against sentences which are void *ipso jure*, and which can be made for thirty years. Finally, only where neither of those two modes of redress is available can application be made for reinstatement.

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[1] Leur. For. Eccl. l. 1, t. 41, Q. 1050, n. 1; Arg. cap. 3 de in int. res. (i. 41).

[2] Clem. cap. un. de in int. rest.; Santi, l. 1, t, 41, n. 1.

§ 2. *By whom and within what Time should Reinstatement be demanded?*

859. Q. Who can demand and obtain reinstatement in matrimonial causes of nullity?

A. All those who have been injured by the sentence. Consequently, reinstatement against sentences in the causes mentioned can be demanded and obtained, (*a*) by the petitioner for the annulment of the marriage,[1] where the sentence affirmed the validity of the marriage; (*b*) by the defendant spouse and by the *defensor matrimonii*, or his successor in office, where the sentence was against the validity of the marriage; (*c*) finally, the judge may, and even should, where there are just reasons, and no one else demands reinstatement, grant it *ex officio*, as he can and should *ex officio* protect valid marriages and dissolve invalid ones, against wrong decisions, no matter how numerous, previously rendered.

860. Q. Within what time should reinstatement be demanded in matrimonial causes of nullity?

A. In causes other than those which involve the validity or invalidity of marriages already contracted, reinstatement must be demanded *within four years*[2] from the time the injury inflicted by the sentence became known to the party seeking reinstatement.[3] We say, *in causes other than, etc.;* for in matrimonial causes of nullity reinstatement, in the sense to be explained, can be asked and obtained, *at any*

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[1] By petitioner we mean not only the husband or wife, but also third persons, —v.g., the fiscal procurator,—who ask that the marriage be annulled.

[2] L. 7 de temp. in integr. (ii. 53); cap. 1 de rest. in int. in 6° (i. 21).

[3] De Angelis, l. 1, t. 41, n. 5.

time and without any limit of time whatever, and therefore within 30 or 40 years, or even within a longer time. Thus the S. C. de Prop. Fide says: "Potestas (novas contrahendi nuptias) tamen post alteram sententiam conformem, ut supra, conjugibus facta intelligatur, salvo semper et firmo remanente jure seu privilegio causarum matrimonialium, *quae ob cujuscunque temporis lapsum nunquam transeunt in rem judicatam;* sed si nova res, quae non deducta vel ignorata fuerit, detegatur, resumi possunt et rursus in judicialem controversiam revocari."[1]

861. The reason of this difference is, because in matrimonial causes of nullity the indissolubility and unity of the marriage bond are involved; now they are *juris divini*, and are consequently entirely independent of and unaffected by any ecclesiastical sentence.[2] Hence judicial sentences in matrimonial causes never pass into *res judicatae*, and therefore never exclude future proof to the contrary, no matter how long a time may have elapsed after the sentence.[3] For no ecclesiastical sentence can make a marriage valid when it is invalid, or, *vice versa*, invalid when it is in reality valid.

862. In other causes the case is different. In them there is question, as a rule, of rights or obligations, which the parties themselves can relinquish, if they desire, or which the Church can declare forfeited unless the proper means of redress are taken within a certain prescribed time. Hence the Church can and does decree that if the parties do not appeal within ten days, or if they desert the appeal, the sentence shall become *res judicata*, that is, shall be looked upon *as truth*, and therefore exclude any further discussion of the cause, or proof showing the sentence to be wrong. Consequently the ecclesiastical judge is not obliged as a matter of strict justice to reopen a case after it has become *res judicata*,

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[1] Instr. *Causae Matr.* § 30.

[2] Leur. For. Eccl. lib. 2, t. 27, Q. 968, n. 1.

[3] Alexander III. cap. 7, 11, de sent. (ii. 27).

even where the most evident reasons demand it. Yet, where good reasons of natural equity demand it, a reopening of the case, or reinstatement, can be granted in causes other than those involving the validity or invalidity of marriages already contracted, even after they have become *res judicatae*, though only as a *matter of favor*, not of strict right or justice, and only within four years, as stated, lest otherwise there be no end to litigations.

863. From this it will be seen also that the reopening of a cause, or reinstatement in matrimonial causes of nullity, where justified by legitimate reasons, is not a *favor*, but a matter of justice, nay of *strict obligation*, whereas in other causes it is always a *favor*, even where strong reasons of natural equity demand it.

§ 3. *Effects of Reinstatement.*

864. Q. What is the effect of this restoration also in matrimonial causes of nullity?

A. 1° When reinstatement has been granted against final judicial sentences, whether in matrimonial causes of nullity or other causes, it has always and invariably this effect, that the case is completely *reopened* and begun *anew;* that consequently a new process or trial takes place, as though none whatever had preceded; that upon the conclusion of the new trial, sentence is pronounced, v.g., declaring the marriage valid, or as the case may be, invalid, and thus setting aside or affirming the sentence against which restoration was granted. Against the sentence pronounced after this new trial the parties and the *defensor matrimonii* have the same right or obligation of appealing as they had in regard to the sentences pronounced in prior trials. In this sense the restoration, also in matrimonial causes of nullity, always places the parties back again into the position or condition in which they were before the injury was inflicted on them.

865. This effect of restoration is called by Card. de Luca[1] its *devolutive* effect, because of its resemblance to the devolutive effect produced by appeals. For as the appeal devolves the whole cause upon the appellate judge, and gives him the right and duty to *reopen* the case, and, if need be, to institute a new trial and pass sentence, so does the reinstatement, when granted, devolve the whole cause, matrimonial or not matrimonial, upon the proper judge (though not upon the appellate judge), and gives him the right and duty to reopen it, to institute a new trial, and pass final sentence.

866. 2° Has the reinstatement, besides the devolutive effect just explained, also a suspensive effect? In other words: Does it, moreover, suspend the execution of the sentence also in matrimonial causes of nullity? The sentence against which the reinstatement was granted has either been already carried into effect or it has not. When the sentence, even though it has passed into *res judicata*, has not yet been carried into effect, v.g., where in a matrimonial cause a sentence decreeing the marriage to be null has not yet been carried out by the remarriage of the parties whose marriage was annulled by two sentences, the restoration has the same effect as an appeal, that is, it suspends the execution of the sentence.[2] Hence the couple in the case cannot pass to a new marriage, pending the restoration and the new adjudication of the cause.

867. But where the sentence has already been executed, v.g., where in a matrimonial cause the parties whose marriage was twice declared invalid by judicial sentences have passed to a new marriage, and thus carried out the sentence, the restoration produces merely a devolutive effect, as stated above, but not a suspensive one. Hence the new marriage contracted after the prior one had been twice declared

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[1] Lib. 15 de Jud. Disc. 38, n. 14.

[2] Card. de Luca, l. 15 de Jud. Disc. 38, n. 13.

invalid is not to be regarded as invalid, and the couple is not to be separated pending the reinstatement proceedings. The reason is, that the presumption of the law (*praesumptio juris*, though not *praesumptio juris et de jure*) is in favor of the new marriage, because of the two decisions adverse to the former marriage. Hence the new marriage cannot be dissolved until the former decisions have been revoked in the new proceeding.

868. We say, *pending the reinstatement proceedings;* for when at the end of the new trial the former marriage is twice declared valid, and the two former sentences decreeing its invalidity are thus revoked, then indeed the subsequent marriage or marriages are thereby *ipso facto* declared null, and the effect of the first two decisions is not only suspended, but absolutely wiped out. Thus the Instr. Austr. says under art. 196: "Sententia de matrimonii valore dicta nunquam in rem judicatam abit. Si post temporis probetur, eam suppositione erronea niti, causa denuo in jus vocanda et forma debita pertractanda est. *Si contingat, ut sententia matrimonii nullitatem pronuntians retractetur, eo ipso matrimonia cuncta, quae conjuges intermedio forsan tempore inierunt, pro irritis declarata sunt.*"

§ 4. *Who can grant Reinstatement?*

869. Q. Who can grant reinstatement, also in matrimonial causes of nullity?

A. According to the general law of the Church, as still in force, also among us, all prelates who possess ordinary jurisdiction *in foro externo*,[1] namely, bishops,[2] etc., can grant reinstatement, also in matrimonial causes of nullity, to those subject to their jurisdiction, and that against final judicial sentences pronounced by themselves or by their predecessors in office, or by other ordinaries not superior to themselves, v.g., by bishops of other dioceses.[1]

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[1] Cap. 9 de in int. rest. (i. 41).

[2] Leur. For. Eccl. l. 1, t. 41, Q. 1079; Santi, l. 1, t. 41, n. 13.

870. Nay, as a rule, the reinstatement is to be asked from and granted by the bishop of the diocese where the party against whom the reinstatement is demanded has his domicile or quasi domicile.[2] For the maxim of law is: "Actor sequitur forum rei."[3] Now in the reinstatement proceedings the person asking for it becomes the *actor* or plaintiff, and the person against whom it is asked, the defendant or *reus*.[4] Consequently in a matrimonial cause of nullity, when the married couple have been lawfully separated, v.g., by a sentence declaring their marriage null, and where in consequence they live in different dioceses, the petition for reinstatement has to be made before the bishop of the diocese where the spouse lives against whom the reinstatement is demanded.

871. We have said, *all prelates with ordinary jurisdiction;* hence reinstatement can be granted, not merely by the Pope, but also by bishops, etc. We have also said, *against final sentences pronounced by other ordinaries not superior to themselves.* Consequently a bishop cannot grant reinstatement against a sentence passed by an ordinary superior to him, v.g., by the Pope, or by a Delegate Apostolic, or by the Sacred Roman Congregations. Hence a new hearing or reinstatement in causes decided by the S. Congregations, or by the Pope himself, or by a Delegate Apostolic, can be granted only by the S. Congregations themselves, or by the Holy Father, or by a Delegate Apostolic.

872. Here it may be asked: Can reinstatement be demanded from and granted by the metropolitan in the matrimonial causes of subjects of his suffragans? In other words: Can the metropolitan grant reinstatement to the subjects of

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[1] L. 16, 17, ff. de Minor. (iv. 4); München, l. c. vol. i. p. 572.

[2] L. 2 C. ubi et quam cogn. (ii. 47).

[3] Cap. 5–8, de for. comp. (ii. 2).

[4] Leur. l. c. l. 1, t. 41, Q. 1079, n. 2.

one of his suffragan bishops? He cannot. Because reinstatement is an exercise of jurisdiction. Now the metropolitan does not possess any jurisdiction over the subjects of suffragans, except through appeals and complaints of nullity. Therefore he does not acquire jurisdiction through a petition for reinstatement. Hence the subjects of a suffragan bishop can obtain reinstatement only from their own bishop or from the Holy See, or from a legate of the Holy See.[1] For the Pope has jurisdiction, not only on appeal, but also in the first instance, over all the members, lay or clerical, of the whole Church, and therefore also over suffragans and the latters' subjects.

873. We have also said that bishops and ordinary judges can grant reinstatement *to those who are subject to them*, that is, to those who have a domicile or quasi domicile in their diocese. The reason is, that the granting of reinstatement is an act of jurisdiction, which can be exercised only over subjects. Now in matrimonial causes of nullity the domicile of the husband is by law considered also that of the wife, except in two cases, namely, (*a*) where the couple have been legitimately separated, v.g., by a judicial sentence declaring their marriage to be invalid; (*b*) where the husband maliciously deserts his wife. Consequently, the petition for reinstatement against a sentence by which the couple became legitimately separated is to be addressed to the bishop of the diocese where the spouse lives against whom the reinstatement is asked, and not where the husband lives.

§ 5. *For what Reasons is Reinstatement granted?*

874. Q. Under what circumstances and for what reasons is reinstatement granted in matrimonial causes of nullity?

A. 1° In causes other than those involving the validity or invalidity of marriages already contracted, the judicial sentence, unless it is void *ipso jure*, passes into *res judicata*, if no appeal is lodged within ten days, or if the appeal, though lodged, is afterwards abandoned. Now, when a sentence has become *res judicata* the case is absolutely closed, and only in very exceptional and extraordinary circumstances is a reopening or reinstatement granted to persons over twenty-five years old, and even then only *as a favor*, not as a right. This is just and necessary. Otherwise there would be no end to litigations and processes.

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[1] Cap. 1 de off. leg. (i. 30); Leur. For. Eccl. l. 2, t. 27, Q. 968, n. 2.

875. 2° We have said *in causes other than*, etc.; for, as we have already pointed out, sentences in matrimonial causes of nullity, even though confirmed twice by the appellate judge, never pass into *res judicatae*, in the full sense of the term, and therefore never close the case entirely, for the reasons already stated. Hence reinstatement or reopening of the case is always to be granted in matrimonial causes of nullity when there are sufficient reasons, and that not as a favor, but as a *strict right*, nay, as an *obligation*, no matter how long a time has lapsed, or how often the cause has been judicially decided, or how frequently the decision has been confirmed.

876. 3° Yet from this it does not follow, by any means, that reinstatement or reopening of the case is to be granted, in matrimonial causes of nullity, for *slight and trivial reasons*. Otherwise, sentences in matrimonial causes would be deprived of all stability or weight, afford no security whatever to the parties, and leave them open to constant annoyance and endless judicial proceedings. Hence the question arises: For what causes is it allowed to reopen a matrimonial cause already decided, and to grant a new trial? The answer is: Only when there are canonical proofs extant, which have either been newly discovered, or which have not been presented before, and which *prima facie* prove that the sentence declaring a marriage valid or invalid was wrong, and based on erroneous suppositions and evidence.

877. This answer needs explanation. We say first, *canonical proofs;* such are, for instance, two competent witnesses,

or an authentic instrument. Hence the mere assertion of the spouse or spouses is not sufficient. A clear instance of this principle is given in the Decretals. The case is as follows: A marriage contracted between D. and E. had been declared invalid by a judicial sentence of the proper ecclesiastical court, on the ground that the diriment impediment of spiritual relationship existed between D. and E. The woman E. then married a second time. Afterwards she confessed or stated that the alleged relationship was contracted only after the marriage, and therefore did not exist at the time the first marriage was solemnized. Pope Clement III., to whom the case was referred by the ordinary, answered: "Quod propter solam confessionem mulieris non est recedendum a sententia per judicium Ecclesiae rationabiliter promulgata, nisi legitime in contrarium probaretur."[1]

878. We have said also, "which *prima facie*," etc. In other words, the new proofs on the strength of which a reopening is asked must be such that if produced at the new trial they will, if not overthrown by contrary evidence, show fully and canonically that the sentence was based on substantial errors.

879. All this follows from the principle that while sentences in matrimonial causes of nullity do not become *res judicata*, and therefore have not in their favor the *praesumptio juris et de jure*,[2] yet they have *in their favor the simple or ordinary presumption of law* (*praesumptio juris tantum*); that is, the law of the Church takes it for granted that the sentence is just, until the contrary is proved.[3] Consequently, the person who attacks the sentence and claims that it is wrong must prove fully, that is, by witnesess, etc., not by his mere assertion, that the sentence was really wrong.[4] The *onus probandi* lies upon him as against the jus-

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[1] Cap. 11, de sent. (ii. 27).

[2] Cap. 7, de sent. (ii. 27).

[3] Cap. 11, de sent. (ii. 27).

[4] Card. Kutschker, l. c. vol. v. p. 974 sq.

tice of the sentence. Until he has proved the sentence to be wrong, the sentence stands as valid and just before the law.

880. Moreover, as we have seen, while sentences in matrimonial causes of nullity do not become *res judicata*, so far as the validity or invalidity of the marriage is concerned, yet they do pass into *res judicata*, in the full sense of the term, *with regard to the expenses* of the trial, to which the succumbing party was condemned, and no reinstatement is granted on this head. Hence if a person does not appeal in due time, he must pay the expenses to which he has been condemned, and the latter are not refunded to him, even if he afterwards shows, in the reinstatement proceedings, that the sentence was wrong.[1]

881. Nay, sentences in matrimonial causes of nullity pass into *res judicata*, in the full sense of the term, even with regard to the validity or invalidity of the marriage, where there is question of diriment impediments *juris privati*. Thus where a marriage was impugned, v.g., because of alleged fear or error, and the sentence affirms there was no fear or error, and in consequence pronounces the marriage valid, such sentence becomes absolutely *res judicata*, even *quoad vinculum matrimonii*, unless appealed from in ten days. Why? Because the party who claims to have suffered fear, etc., can, of course, ratify this defect by giving free consent, and is in fact regarded by presumption *juris et de jure* as having ratified the consent, where he or she does not appeal within the prescribed time, or deserts the appeal. Consequently no reinstatement can be granted in such causes, even with regard to the validity or invalidity of the marriage.[2]

§ 6. *In what Manner is Reinstatement granted?*

882. Q. In what manner should reinstatement be demanded and granted, also in matrimonial causes of nullity?

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[1] Card. Kutschker, l. c. p. 976. [2] Ib. pp. 976, 977.

A. 1° The person demanding the restoration against a judicial decision, also in matrimonial causes, must present a written petition or *libellus* to the competent ecclesiastical judge or ordinary,[1] (*a*) setting forth the nature of the sentence, when and by whom rendered, etc.; (*b*) claiming that the sentence was based on wrong suppositions; (*c*) naming the evidence on which this claim is based; (*d*) asking that the cause be reopened, that a new trial be granted, and that upon its conclusion the sentence be revoked.

2° This petition is to be communicated to the adverse parties,[2] v.g., to the *defensor matrimonii*, to the opposing spouse, etc., to enable them to reply.[3] For the proposed reinstatement is prejudicial to rights acquired by them through the judicial sentence. Hence they should be given an opportunity to show why the reinstatement should not be granted.[4]

3° Next a summary though judicial investigation should take place into the evidence which, it is alleged, promises to prove that the sentence was wrong.[5] If it is found that there is such *prima facie* evidence, the reinstatement is to be conceded; otherwise it must be denied. In case the reinstatement is granted, a day is appointed for a new trial, which is conducted in the same manner as the trial in the first instance.

CHAPTER X.

EXECUTION OF THE SENTENCE AND COSTS OR EXPENSES IN MATRIMONIAL CAUSES OF NULLITY.

ART. I.

EXECUTION OF THE SENTENCE.

883. By the execution of a sentence we mean the carrying into effect what was decreed or decided by the sentence. The execution of a sentence is a judicial act, being, as is evi-

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[1] Leur. For. Eccl. l. 1, t. 41, Q. 1051.

[2] L. 3 ff. de in integr. (iv. 1).

[3] Arg. cap. 4 de in integr. (i. 41).

[4] München, l. c. vol. i. p. 576.

[5] Leur. l. c. Q. 1060, n. 3.

dent, the final act, or the consummation of the whole cause. Hence it is the right and duty of the judge who pronounced the sentence to see that it is carried into effect.

884. Therefore, when a marriage has been judicially declared valid by the ecclesiastical judge, and no appeal has been legitimately interposed, it becomes the right and duty of the ecclesiastical judge who declared the marriage valid to compel, if need be by ecclesiastical punishments and censures, the couple to live together as husband and wife.[1]

885. But if the marriage has been thrice declared invalid, and no further appeal has been interposed, the marriage stands as invalid before the law of the Church, and is regarded as though it had never existed. Hence where the matrimonial trial was begun and conducted *ex officio*, and where consequently both the husband and the wife were defendants, and therefore do not wish to sever their union, the ecclesiastical judge should by all means in his power, and even by censures, seek to execute his sentence, and compel the parties to separate. Thus the Instr. Austr. says, under article 193: "Si natura impedimenti dispensationem excludat,[2] aut conamen adducendi convalidationem effectu careat, nullitatis declaratio partibus annuntianda venit, *necnon prohibendae sunt, ne amplius sibi cohabitent.*"

886. Moreover the dissolution or annulment of the marriage should be noted on the marriage record, so that it may appear on the record that the marriage as recorded has

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[1] Card. Kutschker, l. c. vol. v. p. 985.

[2] Thus it will be seen that before the publication and execution of the sentence finally declaring the marriage invalid the judge should endeavor once more, even at this late stage, to render the marriage valid, v.g., by a dispensation, unless the impediment is *juris divini* or *naturalis*, and therefore admits of no dispensation, or unless grave reasons militate to the contrary. In fact, the Instr. Austr. says, under § 192: "Quando matrimonium irritum esse, tribus conformibus sententiis decretum, impedimentum vero ejusmodi sit, ut renovatione consensus aut dispensatione indulta e medio tolli possit, episcopus, nisi gravis causa contrarium suadeat, aget, ut matrimonium convalidetur."

been declared invalid and exists no longer. Thus the Instr. Austr. says, under art. 204: "Tam nullitatis declaratio quam dissolutio vinculi matrimonialis per vota solemnia effecta, *in libro nuptiali annotanda est.* Si matrimonium in loco ubi neque sponsus neque sponsa domicilium habebat, contractum fuerit, annotatio non tantum libro nuptiali parochiae ubi matrimonium celebratum, sed etiam parochi qui delegationem ad nuptiis adsistendum dedit, inseri debet."

887. After a marriage has been declared null and void in the final instance, the wife loses the *name* and also the *status* of the husband,[1] and the parties can, as we have seen, pass to another marriage so far as the Church is concerned. In order, however, to leave no doubt on this matter, the sentence in the case should expressly state that they can contract a new marriage. The Instr. Austr. says under art. 194: "In sententia finali invaliditatem pronuntiante, *disertis declareter verbis, ex parte prioris conjugii nullum novis ineundis nuptiis impedimentum superesse.*"

888. We have said, *so far as the Church is concerned;* for in this country, as in nearly all other countries, even the so-called Catholic, the secular law does not recognize or give civil effect to the annulment of a marriage pronounced by an ecclesiastical tribunal. Hence it would not be safe, so far as the civil law is concerned, for parties whose marriage has been annulled by the ecclesiastical judge to contract a new marriage until they had also obtained an absolute divorce —a divorce *a vinculo,* as it is called—in the secular courts. Hence Catholics are allowed, under these circumstances,[2] to apply to the secular courts for an absolute divorce, that is, annulment of their marriage,[3] not as though they recognized any power on the part of the state to dissolve a marriage validly contracted by them,[4] but merely for the purpose of

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[1] Card. Kutschker, l. c. vol. v. p. 985.

[2] S. C. Inqu. 9 Sept. 1824.

[3] Our Notes, etc., p. 251 sq.

[4] Kenrick, Mor. vol. ii. tract. 21, cap. 4.

protecting themselves against unjust vexations and legal penalties.[1]

889. Finally, as we have shown, it is strictly forbidden for a couple to pass to a new marriage until their former marriage has been finally declared invalid by the ecclesiastical judge. If they nevertheless do so, they sin grievously, and subject themselves to grave penalties of the Church. But if at the end of the process in the ecclesiastical courts their former marriage is declared invalid, their second marriage is to be regarded as a true marriage unless another diriment impediment stands in its way. This is expressed by the Instr. Austr. § 199, as follows: "Per se liquet conjuges, antequam finalis nullitatis sententia lata sit, ad novum contrahendum matrimonium nullatenus admitti debere. Quam vis autem conjunctio ante finalem sententiam inita nunquam non illicita valde sit, immo iisdem ac polygamia poenis ecclesiasticis subjaceat, tamen si processus qui agitatur, nullitatis declaratione terminetur, nec aliud quidpiam praepropere copulatis obstet impedimentum, pro vero reputari debet matrimonio."

ART. II.

EXPENSES OF ECCLESIASTICAL TRIALS IN MATRIMONIAL CAUSES OF NULLITY.

890. Generally speaking, both the sentence of the first instance and of the appellate court should, also in matrimonial causes of nullity, state who is to pay the costs of the proceedings.[2] We shall therefore briefly explain the matter.

891. Q. What are the various kinds of expenses of ecclesiastical trials in matrimonial causes of nullity?

A. Chiefly these: 1° Expenses which are incurred by each party, namely, plaintiff and defendant, in prosecuting or defending the case. Such are the expense of witnesses, of the advocate, of travelling, etc. 2° Those incurred by the court itself, excluding always the judge, who is paid by the diocese. Such are therefore the fees of the secretary, of the messenger of the court, etc. 3° Those which come under the head of damages (*damna*), namely, pecuniary compensation for the annoyance, loss of time, etc., caused by the litigation, apart from the direct expenses of the proceedings.[1]

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[1] Konings, Mor. n. 1053, Q. 2.

[2] Card. Kutschker, vol. v. pp. 925, 948; Schulte, Eheproc. p. 330.

892. Q. Who is to pay the expenses of the ecclesiastical trial in a matrimonial cause of nullity?

A. 1° The rule is, that in the beginning and during the progress of the trial, and until the final decision has been given by the judge, each party must bear his own expenses, v.g., for his advocate, the witnesses produced by him, etc.[2] The reason is, that at this stage of the proceedings the law presumes that each party has entered upon the trial from sufficient and reasonable motives, and in good faith. We have said, *the rule is;* the exception is *notable poverty.* For where a litigant, whether he be the petitioner for the annulment of the marriage or the defendant spouse, *is too poor* to pay anything, he is free of all costs, and consequently is not charged anything for the papers given him; nay, the judge should even assign him an advocate,[3] who will either be paid by the court, or who will give his services gratis.[4]

893. 2° When the trial is over, the rule is that the succumbing or defeated party, whether it be the petitioner for the annulment or the defendant spouse, is to be condemned by the judge, and that in the final sentence, to pay the entire costs,[5] namely, not only his own, but also those incurred by his opponent and by the court itself.[6] The reason is, that the

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[1] Arg. cap. *Statutum* 11, §§ 4, 5, 6, de Rescr. in 6° (i. 3).

[2] Our Elements, vol. ii. p. 461.

[3] Card. Kutschker, l. c. p. 988.

[4] Schulte, Eheproc. p. 332.

[5] L. 3, C. de fruct. (vii. 51).

[6] Card. Kutschker, l. c. pp. 986, 987.

law justly presumes that a litigant who has entirely failed to establish his case, or who has been completely defeated, entered upon the proceedings carelessly and without due regard for the rights of his opponent.[1]

894. In order to ensure the payment of these outlays, and to obviate the difficulty of collecting them after the trial, the judge may oblige the complainant or petitioner for the annulment of the marriage to deposit a sufficient sum of money with the episcopal curia before the beginning of the proceedings. The amount is not fixed by the general law of the Church. It varies in various countries. In France the amount in the case of an ordinary marriage process of nullity is $200 or 1000 fr., and when there is question of impotency or non-consummation, the amount is $300, on account of the additional outlay for the physicians deputed to make the corporal inspection.[2]

895. We have said, *the rule is.* The exceptions are: (*a*) When the defeated party is poor.[3] Now those are considered poor who earn merely the ordinary wages of a laborer, and have no other income.[4] (*b*) Where the defeated party had a just or probable cause for entering upon the proceedings and therefore acted in good faith. In this case the judge should oblige each party to pay his own expenses, and should assess the costs of the court equally upon both litigants. (*c*) Where the marriage was impugned *ex officio,* no costs should be put on the spouses or married couple whose marriage is called in question,[5] and who are therefore the defendants, even where they succumb.[6]

896. By costs we mean the *actual* or *positive* and necessary outlays of the parties or court, not the *indirect* losses or damages which result from the loss of time, etc., incident to

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[1] Schulte, l. c. p. 331.

[2] Gasparri, l. c. n. 1207.

[3] Cap. *Statutum* 11, § 4, de Rescr. in 6° (i. 3).

[4] Schulte, l. c. p. 332.

[5] Card. Kutschker, l. c. p. 988.

[6] Schulte, Ehepr. pp. 331, 332.

trials. Now the question arises: When can a defeated party, also in matrimonial causes of nullity, be condemned by the ecclesiastical judge to pay the victor not merely the direct expenses, but also damages (*damna*), or the indirect ones? We answer: A defeated party, also in matrimonial causes of nullity, can be mulcted in damages or indirect outlays, (*a*) when he has entered upon the trial or proceedings, not simply through carelessness or want of thought, but through *malice, ill-will, or chicanery* (*calumnia*); (*b*) when he has unduly retarded the proceedings by dishonest and tricky exceptions, or by disobedience to the citations of the judge. The damages are to be taxed or fixed by the judge in the final sentence.[1] It will be seen that damages or indirect expenses are imposed upon the succumbing party *as a punishment* for *chicanery* or *dishonesty* in judicial proceedings.[2]

897. Q. By whom is the *defensor matrimonii* to be paid for his services?

A. Pope Benedict XIV. answers thus:[3] "Defensor autem matrimonii, quem ad munus suum gratis obeundum pro amore Dei, et proximi utilitate, et ecclesiae reverentia, in Domino exhortamur, si operam suam sine mercede aut salario, aliqua ex causa exhibere recusaverit, *ab ipsius causae judice ei constituatur, et ab ea parte quae pro validitate matrimonii agit*, si ipsi facultas sit, solvatur, sin minus a judice primae vel secundae vel tertiae instantiae respective subministrabitur, qui pecunias ex mulctis suorum tribunalium redactas vel redigendas, et in opera pia erogandas, in hujusmodi sumptus insumere poterunt." [4]

898. Against immoderate costs or damages imposed upon a party, the latter can interpose a regular appeal to the next higher superior, v.g., to the metropolitan.[5]

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[1] Our Elements, vol. ii. p. 464, 4th ed.

[2] Card. Kutschker, l. c. pp. 986, 987.

[3] Const. *Dei Miseratione*, § 12.

[4] Cf. Feije, de Imp. pp. 463, 464.

[5] Our Elements, vol. ii. p. 464.

899. Q. What are the expenses before the Sacred Congregation de Prop. Fide in matrimonial causes of nullity?

A. When a matrimonial cause is appealed to Rome, or decided there in the first instance, the expenses before the S. C. de Prop. Fide will usually amount to 1000 fr. or $200. This sum is to be deposited in advance, with the Sacred Congregation, by the appellant or petitioner for the annulment, and will serve to defray the cost of printing, translating, etc., the documents or papers sent to Rome. For everything has to be printed there.[1]

900. The Sacred Congregations do not, as a rule, require the succumbing party to refund to the victor the expenses incurred by him, or to pay him damages, except where the defeated party has acted maliciously or rashly. But when the wife is poor and the husband rich, the Sacred Congregations usually decree, before the opening of the trial, that the husband must pay all the expenses of the trial, even those of his wife.[2]

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[1] Gasparri, l. c. n. 1207.

[2] Ib. n. 1208.

APPENDIX.

INSTRUCTIO PRO JUDICIIS ECCLESIASTICIS IMPERII AUSTRIACI

QUOAD CAUSSAS MATRIMONIALES.

TITULUS PRIMUS.

DE MATRIMONIO.

Foederis conjugalis natura et sanctificatio.

§ 1. Matrimonium est conjunctio maris et foeminae ad propagationem humani generis et mutuum adjutorium Dei voluntate ordinata: quod cum in ipsis ejus primordiis indissolubile esset institutum et eam accepisset legem, ut conjuges duo essent in carne una, a Christo Domino ad pristinam dignitatem reductum et in sacramentum novae legis evectum est.

Sponsalia.

§ 2. Sponsalia sunt conventio, qua mas et foemina sibi matrimonii inter eos ineundi fidem dant.

Validitatis eorum conditiones.

§ 3. Sponsalia valide iniri nequeunt, nisi per voluntatis declarationem libere ac debita cum deliberatione factam ab iis, qui matrimonium inter se valide ac licite contrahere possunt. Impuberum nomine inita impuberes ad matrimonium contrahendum haud obligant, nisi, postquam ad pubertatem pervenerint, rata eadem habuerint.

Mutuo consensu solvi possunt.

§ 4. Sponsalia, licet jurejurando firmata sint, mutuo tamen consensu dissolvi possunt.

Quatenus absque mutuo consensu solvantur.

§ 5. Sub paterna potestate consitutorum sponsalia solvenda sunt, quoties parentes juste contradicant.

§ 6. Quando una pars fidem sponso debitam violaverit, altera promissis stare non amplius tenetur. Quodsi post sponsalia inita talis intercedat mutatio, ut merito supponatur, hoc obtinente rerum statu haud eventurum fuisse, ut ad sponsalitia pacta procederetur, horum obligatio pro ea cessat parte, in qua ejusmodi mutatio haud contigit. Casu, quo talia rerum adjuncta jam sponsalium initorum tempore locum habuere, parti, cui ignota tunc fuerunt, jus competit a sponsalibus resiliendi.

§ 7. Sponsi obligatione, quam sibi imposuerunt, non impediuntur, quin religionem ingrediantur aut Deo in statu clericali militent. Professione religiosa aut ordinis sacri susceptione sponsalia dissolvuntur.

§ 8. Matrimonio, quod una pars cum tertia quadam persona contrahit, sponsalia quidem dissolvuntur, salvum tamen permanet jus, quod alteri parti quoad damnum resarciendum pro re nata competit.

Ad damnum resarciendum obligatio.

§ 9. A sponsalibus absque legitima causa resiliens, nec non qui legitimam resiliendi causam vel celaverit, vel sua culpa adduxerit, tenetur ad resarciendum alteri pro personarum et rerum adjunctis damnum, quod resiliendo ipsi infertur.

§ 10. Obligatio standi promissis per contractum sponsalitium datis tunc quoque cessat, quando omnibus perpensis circumstantiis supponendum merito sit, matrimonium a sponsis contrahendum infaustum fore. Quodsi autem circumstantiae, quibus suppositio ista innititur, culpa unius partis exortae sint, haec alteri damnum, quod ipsi frustratis justis ejus expectationibus illatum est, pro viribus resarcire tenetur.

Ad matrimonium valide contrahendum necessaria.

§ 11. Causa efficiens matrimonii est consensus mutuus, in quantum a personis ad contrahendum habilibus respective forma praescripta declaratur.

§ 12. Ad conjunctionem, quae vere matrimonum sit, ineundum inhabiles sunt omnes et ii tantum, quos lex divina et ecclesiastica inhabiles pronuntiat.

Impedimenta dirimentia:

Defectus aptitudinis ad consentiendum.

§ 13. Amentes, furiosi, infantes, et quicunque impares sunt, talem, qualem rei natura exigit, consensum praestando, matrimonium contrahere nequeunt.

Error in persona.

§ 14. Ne consensus detur et matrimonium contrahatur, impedit error, qui versatur circa personam futuri conjugis, aut qui in personam redundat. In personam redundat error in ea tantum qualitate, qua sola futuri conjugis persona determinatur.

Error circa conditionem servilem.

§ 15. Quodsi contingeret, ut liber contrahat cum servo vel serva, quos liberos putet, irritum foret matrimonium.

Impotentia ad debitum conjugale praestandum.

§ 16. Impotentia debitum conjugale praestandi matrimonium antecedens et insanabilis, ne matrimonium valide contrahatur, impedit.

Impubertas.

§ 17. Quum pueri, qui decimum quartum, et puellae, quae duodecimum aetatis annum nondum absolverint, de regula neque physice ad matrimonium apti, neque ii sint, qui matrimonii contrahendi vim, prout decet, intelligant, de jure ad matrimonium inhabiles censentur. Quodsi autem unquam eveniret, ut hac aetate minores et physica et morali ad matrimonium aptitudine pollerent, nihilominus, nisi desuper ab Episcopo dioecesano vel ab ipsa Apostolica Sede sententiam declaratoriam obtinuerint, matrimonio jungi non possent.

Vis et metus.

§ 18. Consensus, ad quem exprimendum quis a quocunque per malum magnum et inevitabile injuste ipsi vel illatum vel intentatum compellitur, ad matrimonii vinculum nectendum haud sufficit.

Raptus.

§ 19. Mulier, quae matrimonium ineundi causa rapta fuerit, cum raptore, quamdiu in ejus potestate manserit, matrimonium valide contrahere nequit. Rapta censenda est mulier, quae violentia ipsi illata vel abducitur, vel in loco, ad quem dolo allecta est, detinetur; nec non ea, quae a viro, cui ante facinus rite desponsata haud fuit, ipsa licet consentiente, insciis tamen vel invitis parentibus seu tutoribus abducitur.

Ligamen.

§ 20. Matrimonii vinculum eodem junctos ad aliud matrimonium contrahendum inhabiles reddit.

§ 21. Vinculum matrimonii valide contracti sed nondum consummati per solemnem religionis professionem alterius conjugis vel Summi Pontificis dispensatione dirimitur. Matrimonium a Christianis contractum, postquam consummatum fuerit, nonnisi morte solvi potest.

§ 22. Quodsi Christiani non catholici autument, matrimonii vinculum solvi posse, Ecclesia errantes deplorat, verum pati nequit, ut error legis suae sanctitatem contaminet. Inter Catholicum et Christianum non catholicum, qui conjugem superstitem habet, matrimonium consistere nequit, licet tribunal, apud quod caussae matrimoniales Christianorum non catholicorum tractari solent, separationem quoad vinculum pronuntiaverit.

§ 23. Quum per sacramentum baptismi non solvantur conjugia, sed crimina dimittantur, matrimonium ab infidelibus contractum conjugibus ad Christum conversis firmum manet, non obstantibus impedimentis ecclesiastica lege institutis. Quodsi autem altero tantum conjuge converso alter in infidelitate persistens cum eodem cohabitare interpellatione neglecta omnino renuat aut cohabitare nolit absque contumelia creatoris, eidem petenti concedendum est, ut ad novas convolet nuptias; quibus rite celebratis vinculum conjugii in infidelitate contracti dirimitur.

Ordo sacer et votum solemne.

§ 24. Clerici in majoribus constituti et regulares, qui vota solemnia emiserunt, ad matrimonium ineundum habiles non sunt. In quantum vota simplicia in congregatione regulari emissa eum per exceptionem sortiantur effectum, ut matrimonium irritent, secundum statuta ordinum a Sede Apostolica approbata dijudicandum est.

Cultus inter baptizatos et non baptizatos disparitas.

§ 25. Inter baptizatos et eos, qui regenerationis sacramentum haud susceperunt, matrimonium consistere nequit.

Consanguinitas.

§ 26. Qui in linea recta aut in quarto vel proximiori quodam lineae transversae gradu consanguinei sunt, validum inter se matrimonium contrahere non possunt, neque refert, an consanguinitas ex copula licita vel illicita exorta sit.

Cognatio spiritualis.

§ 27. Cognatio spiritualis, quae ex baptismo et confirmatione oritur, dirimit matrimonium inter sacramenti dispensatorem et baptizatum vel confirmatum, nec non baptizati vel confirmati parentes, inter patrinum quoque et baptizatum vel confirmatum, nec non baptizati vel confirmati parentes.

Cognatio affinitasque civilis.

§ 28. Adoptio, qualis arrogationi seu adoptioni perfectae juris Romani quoad essentialia respondet, secundum nunc vigentem Ecclesiae praxim, etiam postquam dissoluta fuerit, matrimonium dirimit inter adoptantem adoptatumque et ab adoptato descendentes sub paterna ejus potestate adoptionis tempore constitutos, nec non inter adoptantem adoptatique uxorem et adoptatum vicissim adoptantisque uxorem. Praeterea quamdiu adoptio perdurat, inter adoptatum et adoptantis liberos carnales, legitimos, sub potestate paterna constitutos matrimonium consistere nequit.

Adoptio juris Austriaci.

§ 29. Adoptio juris Austriaci intra praefatos terminos matrimonium dirimit, quoties adoptatus paternae adoptantis potestati subjiciatur vel in ejusdem domum filiorumfamilias ad instar cohabitaturus recipiatur. Quodsi autem neque paternae adoptantis potestati subjiciatur neque in ejusdem domum cohabitaturus recipiatur, adoptio juris Austriaci imperfectae aequiparanda est et nullum matrimonii impedimentum involvit.

Affinitas ex copula licita.

§ 30. Matrimonium consummatum inter unam partem et alterius quartum usque inclusive gradum consanguineos affinitatem parit, qua irritatur matrimonium inter eosdem initum.

Affinitas ex copula illicita.

§ 31. Concubitus extra matrimonium habitus dirimit matrimonium contrahendum inter unam partem et alterius consanguineos in primo vel secundo gradu.

Affinitas superveniens.

§ 32. Conjux, qui cum alterius consanguineis in primo vel secundo gradu copula carnali culpose jungitur, privatur jure debitum conjugale petendi, donec dispensationem obtinuerit.

Justitia publicae honestatis.

§ 33. Matrimonium ratum, non consummatum, conjugem, qui supervixerit, aut in saeculo remanserit, inhabilem reddit ad matrimonium ineundum cum alterius consanguineis quartum usque inclusive gradum.

§ 34. Matrimonium invalide contractum non consummatum, nisi propter defectum consensus nullum sit, impedit, ne conjugium subsistat inter unam partem et alterius consanguineos quartum usque inclusive gradum.

§ 35. Sponsalia valide et pure inita obstant, ne sponsorum alter cum alterius consanguineis in primo gradu matrimonium contrahat. Idem operantur sponsalia sub honesta conditione contracta, postquam eadem purificata fuerit.

Adulterium.

§ 36. Inter eos, qui adulterio se polluerunt, matrimonium valide contrahi nequit, quando altero adhuc vivente conjuge matrimonii ineundi fidem sibi dederint vel matrimonium de facto inire attentaverint, aut quando vel una tantum pars ea intentione, ut cum altera matrimonio jungi queat, in mortem conjugis, cujus jura adulterio violavit, machinata fuerit effectu secuto.

Conjugicidium.

§ 37. Conjugicidium inter conjugem ejusdem reum et personam, cum qua ad crimen patrandum conspiravit, matrimonium invalidum efficit, quando vel una tantum pars facinus ea intentione perpetraverit, ut cum altera matrimonium inire possit.

Clandestinitas.

§ 38. Ad matrimonium valide ineundum requiritur, ut contrahentes coram parocho proprio utriusque vel unius partis aut alio sacerdote de ipsius parochi seu Ordinarii licentia et duobus vel tribus testibus consensum declarent. In iis tamen Imperii partibus, pro quibus Sancta Sedes instructionem dd. 30 April. 1841 edidit, absentia parochi catholici quoad matrimonia inter Catholicos et Christianos non catholicos ad ipsa irritanda non sufficit.

Domicilium verum et quasi domicilium.

§ 39. Proprius nupturientium parochus est is, in cujus parochia verum aut quasi domicilium habent.

§ 40. Domicilium verum ibi locorum est, ubi quis habitationem suam vel unice vel principaliter figit, ita, ut peregrinari dicatur, quando ibi non commoretur. Quamdiu hoc in loco habitationem sibi vel familiae suae destinatam retinet, absentia longior licet, per se sumta, non sufficit ad efficiendam domicilii veri translationem. Ubi quis duraturam figere sedem haud quidem intendit, verumtamen talem habitat in finem, ad quem assequendum longior commoratio requiritur, ibi quasi domicilium habet.

§ 41. Uxor, ubi maritus; minorennes, ubi parentes, nutritii, tutor, verum habent domicilium. Locus, ubi e. gr. uxor servitia praestat, aut minorennis studiorum ergo commoratur vel persona militaris stativa habet, ipsorum quasi domicilium reputandus est. Quinam minorennis censendus vel minorennibus quoad relationes juridicas aequiparandus sit, juxta legem Austriacam dijudicandum venit.

§ 42. Officiales publici nec non ii, qui ad servitia quaecunque publica in dies vitae assumti sunt, domicilium verum eo habent in loco, ubi ad muneris servitiive sui ordinarii partes explendas habitant. Quando alio in loco ad extraordinarium deputantur ministerium, quod pro sua natura longiorem postulat moram, ibi quasi domicilium acquirunt.

§ 43. Qui hominis privati, societatis aut instituti cujusdam servitiis se mancipat, quasi domicilium acquirit in loco, ubi ad servitia haecce praestanda habitat. Haud ea tamen sint oportet, quae continuam habitationis mutationem inferant. Neque ratione servitiorum, quorum quis tenore herum quoad habitationem sequi debet, loco, quo herus domicilium non habet, domicilium acquiri potest.

§ 44. Casu, quo quis extra locum domicilii veri in aliis adhuc parochiis domus ejus usibus destinatas instructasque possideat, in illo tantum horum locorum quasi domicilium habet, ubi vel quovis anno per notabile tempus commorari solet, vel tempore, quo locum qua domicilium asserit, per sex ad minimum septimanas habitat.

§ 45. Eorum, qui neque verum, neque quasi domicilium habent, parochus proprius is est, in cujus parochia commorantur.

Competens personarum militarium parochus.

§ 46. Proprius personarum ad militiam vagam pertinentium parochus est capellanus et respective superior castrensis juxta tenorem facultatum a Sancta Sede concessarum. Qui militiae stabili annumerantur, parochum domicilii adeant oportet.

Licentia tacite concessa et mere praesumta.

§ 47. Quod licentia matrimonio assistendi ab eo, cui competit (§ 38), tacite collata sit, foederis conjugalis valori haud obest: attamen absque urgentissima quadam necessitate copulationem non peragat, cui a parocho vel ab Ordinario ipso facultas expresse haud facta sit. Licentia mere praesumta non sufficit; neque juvat, quod delegandi jus habens de ea requisitus reapse eam concessurus fuisset, aut rem postmodum ratam habeat.

Subdelegandi jus.

§ 48 Qui licentiam matrimonio assistendi pro universitate casuum accepit, eam pro singulis casibus alii sacerdoti concedere potest. Qui licentiam istam pro singulo casu accepit, jure subdelegandi caret, nisi expresse ipsi collatum sit.

Decisio de parochi competentia.

§ 49. Quando ex quacunque ratione dubium emergat, cuinam animarum curatori jus matrimonio assistendi competat, res ad Episcopum deferenda ac ejus decisio vel ordinatio exspectanda est.

Matrimonium per procuratorem contractum.

§ 50. Consensus declaratio per procuratorem facta valida est, quando hanc in rem ei mandatum speciale, personam futuri conjugis sufficienter determinans, collatum, neque tempore forsan, quo mandantis nomine matrimonium contractum sit, revocatum jam fuerit. Parochus tamen matrimonium per procuratorem ineundum nullatenus admittat, nisi Episcopus facultatem expresse concesserit.

Conditio.

§ 51. An consensus sub conditione datus causa efficiens matrimonii sit, a conditionis impletione dependet.

§ 52. Quando conditio versetur circa futurum contingens, vel non contingens, matrimonium suspenditur, usque dum conditio impleatur. Quod si non impleatur, consensus dati effectus cessat. Quando consensus alligatur conditioni de praesenti vel de praeterito, matrimonium validum est vel non, prout conditio impleta jam sit, vel non.

§ 53. Irritus esset consensus, qui alligaretur conditioni substantiae matrimonii repugnanti. Conditiones impossibile quidpiam aut immorale, quod matrimonii substantiae haud repugnat, continentes pro non adjectis habendae sunt.

§ 54. Qui ante conditionem impletam matrimonium consumma., eo ipso conditioni nuntium mittit.

§ 55. Ut consensus sub conditione detur, non nisi de expressa Episcopi licentia admitti potest. Conditiones, quae in consensus declaratione haud exprimuntur, pro non appositis habendae sunt.

Impedimenta impedientia:

§ 56. Ecclesia matrimoniorum et decori et puritati omni ex parte provisura, nec tamen consultum ducens, ut impedimentorum dirimentium numerus nimis augeatur, de matrimonio eonstitutiones edidit, pro quibus obedientiam postulat, quarum tamen transgressio matrimonii nullitatem minime involvit.

Sponsalia.

§ 57. In quantum et quamdiu sponsalia obligationem ad matrimonium contrahendum inducunt, illicitas reddunt nuptias, quascunque sponsorum alter cum tertia quadam persona contrahit.

Votum simplex.

§ 58. Vota simplicia obedientiae, paupertatis et castitatis in religiosa quadam congregatione emissa, nec non votum simplex perpetuae castitatis, religionis, ordinis sacri et coelibatus eisdem ligatos haud sinunt matrimonium licite contrahere.

Tempus sacratum.

§ 59. A prima Dominica Adventus usque ad festum Epiphaniae Domini inclusive, et a feria quarta Cinerum usque ad Dominicam in Albis inclusive prohibitum est, nuptias celebrare.

Bannus nuptialis.

§ 60. Matrimonium, antequam contrahatur, a parocho sponsi ac sponsae tribus diebus dominicis vel festivis inter missarum solemnia publice denuntiandum et omnis, cui impedimentum aliquod notum, ad revelandum istud monendus est. Persona nupturientium expresso utriusque nomine baptismali, cognomine, loco nativitatis, aetate, conditione ac domicilio adcurate determinetur.

§ 61. Si sponsus vel sponsa non tantum verum, sed etiam quasi domicilium habet, trina proclamatio tam a parocho veri, quam a parocho quasi domicilii eorum instituenda est. Quando autem contingat, ut persona quaedam praeter domicilium verum plus quam unum habeat quasi domicilium, sufficit, ut matrimonium a parocho veri ejusdem domicilii ac ab uno parochorum, in quorum territorio quasi domicilium habet, rite denuntietur.

§ 62. Si sponsus vel sponsa in nulla parochiarum, ubi secundum regulas antefatas proclamatio fieri debet, per sex saltem septimanas habitet, proclamatio instituatur praeterea in Ecclesia parochiali ejus loci, ubi persona, de qua agitur, ultimo per sex saltem hebdomadas habitaverit. Peculiaribus rerum adjunctis, ne id commode fiat, obstantibus, ea de re ad Episcopum referendum est.

§ 63. Apud eos, qui neque verum habent domicilium, neque in loco quasi domicilii per anni ad minimum tempus jam commorantur, proclamationes etiam, ubi jura indigenatum in communitate civili habentium eis competunt, et quando ejusmodi jura nullibi eis competant, quantum fieri possit, etiam in parochia loci eorum natalis instituendae sunt. Nupturiente non tantum vero, sed etiam quasi domicilio carente, proclamatio fiat tam in parochia, ubi tunc temporis commoratur, quam in loco, ubi jura indigenatum in communitate civili habentium ei competunt, aut quodsi nullibi iisdem gaudeat, quantum fieri possit, in parochia loci natalis.

§ 64. Iterandae sunt proclamationes, quando intra sex post eas peractas menses matrimonium non contrahatur, vel et minori elapso tempore renovationem Episcopus imperet.

§ 65. Antequam proclamationes rite institutae fuerint, matrimonium licite contrahi nequit.

Disparitas cultus inter Christianum et apostatam nec non inter Christianum catholicum et non catholicum.

§ 66. Ecclesia detestatur fidelium cum apostatis conjugia; improbat quoque matrimonia inter Catholicos et Christianos non catholicos et ab ipsis ineundis suos dehortatur.

Interdictum Ecclesiae.

§ 67. Quando fundata adsit suspicio, nupturientibus impedimentum quoddam obstare, aut timendum veniat, nuptias magnis litibus vel scandalis, aliisve malis ansam praebituras, sacrorum Antistiti jus competit et respective obligatio incumbit, matrimonii celebrationem interdicere. Quamdiu interdictum ab eodem sublatum non sit, matrimonium contrahere illicitum est.

Parentum consensum.

§ 68. Etiam in nectendo matrimonii vinculo memores sunto filiifamilias Domini dicentis: Honora patrem tuum et matrem tuam! Praeterea prona est ad praepropera consilia juventus, nisi maturioris aetatis experientia regatur, et conjugia absque debita deliberatione inita uberem malorum continent fomitem. Quocirca illicita sunt matrimonia, quae parentibus justis ex causis assensum denegantibus contrahuntur.

Prohibitiones legis Austriacae.

§ 69. Sanctum est Christiano, potestati civili praestare obedientiam, ad quam Dominus ipse nos per Apostolum suum instituit. Eo districtius eas observet necesse est constitutiones civiles, quae ad ordinem moralem conservandum accurate concurrunt. Quamvis igitur potestas civilis, quin validum inter Christianos matrimonium contrahatur, sanctionibus suis impedire minime possit, civi tamen Austriaco haud licet, negligere praescriptiones, quas lex Austriaca de civilibus matrimonii effectibus statuit.

Quatenus nupturientes ad copulationes admittendi.

Documenta necessaria.

§ 70. Ad matrimonii celebrationem contracturi tunc tantum admitti debent, quando conjunctioni eorum nullum, quantum sciri possit, obstet impedimentum et cuncta praestiterint, quae Ecclesiae leges ad matrimonia invalida aut illicita excludendum praescribunt. In specie ipsis incumbit, proclamationes rite peractas esse comprobare nec non liberi status testimonium exhibere; et nisi aetas et origo eorum ex libris parochialibus colligi possit, litteras baptismales afferre. Quodsi nupturiens testimonium sibi baptismale parare plane non valeret, parochus ad Episcopum recurret. Supra memoratas legis Austriacae praescriptiones quod attinet, magno agendum studio, ut a matrimonium contracturis exacte observentur. Quod si contingat, ut parochi monita nihil proficiant, res ad Episcopum deferenda. Hoc ipsum fiat, si alia quacunque ex causa difficultates vel dubia enascantur.

Exterorum matrimonia.

§ 71. Caveatur oportet, nec exteri aliter, quam servatis omnibus, quae ad matrimonium rite celebrandum requiruntur, matrimonium contrahere permittantur. In quantum parochus hoc in negotio procedere possit, quin ipsum curiae episcopali dijudicandum proposuerit, Episcopus pro rerum adjunctis constituet.

Matrimonia praematura.

§ 72. Procurandum est, ut avertantur matrimonia eorum, qui annum quidem decimum quartum et respective duodecimum absolverunt, ast nondum attigerunt aetatem, qua pro terrae gentisque ratione aptitudo ad matrimonium debita cum deliberatione ineundum et maturitas physica adesse solet.

Copulatio nupturientium domicilio carentium.

§ 73. Copulationem eorum, qui nec verum, nec quasi domicilium habent, peragere non licet, antequam Episcopus ipse licentiam concesserit.

Instructio religiosa.

§ 74. Quum matrimonium novi foederis sit sacramentum et ejus vinculo se devincientibus sanctas gravissimasque imponat obligationes, qui elementa fidei Christianae ignorant, ad nuptias admitti nequeunt; immo antequam de Deo ejusque mandatis saltem scitu absolute necessaria didicerint, nec ad proclamanda ipsorum matrimonia parochi procedant.

S. Sacramentorum susceptio.

§ 75. Decet, ut sponsi, priusquam in facie Ecclesiae foedere mortem usque duraturo jungantur, poenitentiae sacramento cor emundet et corpus Domini nostri devote suscipiant. Nec ante benedictionem sacerdotalem in templo suscipiendam in eadem domo cohabitent. De hisce ac omnibus, quae conferre possunt, ut matrimonium pie ac decore celebretur, statuta et laudabiles consuetudines cujusque dioecesis fideliter observandae sunt.

Libri nuptialis gestio.

§ 76. Parochus, cui copulationem peragere competit, tenetur, matrimonium contractum cum omnibus rerum adjunctis, quae ad probationem efficiendam necessaria vel utilia sunt, libro nuptiali parochiae suae propria manu inscribere. Distincte igitur exprimantur: Nomen baptismale, cognomen, aetas, religio, habitatio et conditio conjugum; insuper, an prius jam matrimonio juncti fuerint; porro nomen, religio et conditio parentum et testium, dies, quo, nec non sacerdos, coram quo matrimonium inierunt. Quodsi difficultates emerserint, modus, quo sublatae fuerint, indicandus venit.

§ 77. Quodsi parochus sacerdotem quemdam deleget ad copulandum sponsos in loco, ubi neuter eorum domicilium habet, incumbit ipsi, rem in libro copulatorum parochiae suae annotare. Parochus loci, ubi matrimonium contrahitur, actum modo superius exposito libro copulatorum parochiae suae propria manu inscribere et addere simul debet, a quonam parocho delegatio concessa sit. Posterior tenetur pariter, copulationem peractam, de qua spatio octo dierum certior redendus est, libro copulatorum parochiae ipsius inferre.

§ 78. Casu quo civis Austriacus petit, ut matrimonium ab eo in exteris terris initum libro copulatorum parochiae, ubi nunc domicilium fixit, inseratur, parochus libellum supplicem simul cum probationibus de conjugio rite inito allatis Episcopo proponet ac ejusdem expectabit mandata.

Dispensatio in impedimentis matrimonii.

§ 79. Ea matrimonii impedimenta, quae juris canonici sanctionibus innituntur, dispensatione legitime obtenta et conditionibus, quae forsan adjunctae sint, adimpletis pro singulis cessant casibus. In impedimentis dirimentibus proprio jure dispensare solius Apostolicae Sedis est, cui reservatum quoque, in voto castitatis simplici, sed perpetuo, nec non in disparitate cultus inter Catholicos et Christianos non catholicos dispensationem indulgere.

Impedimenta, in quibus dispensatio facilius concedenda.

§ 80. Episcopi, cum canonicae non deficiant rationes, faciles erunt in utendo facultatibus a Sancta Sede concessis, sequentia quoad impedimenta:

1. In tertio et quarto gradu consanguinitatis et affinitatis ex copula licita.

2. In cognatione spirituali.

3. In affinitate ex copula illicita, nisi timendum sit, ne ex immundis commerciis, nupturientes consanguinitate in linea recta juncti sint.

4. In tertio et quarto gradu justitiae publicae honestatis ex matrimonio rato con consummato.

5. In justitia publicae honestatis provenienti ex matrimonio invalide contracto et non consummato, aut ex sponsalibus.

Quoad ceterorum dispensationem tenenda.

§ 81. Cetera quod attinet impedimenta dirimentia, unanimi conatu agendum est, ut efficax eorum vigor aut asseratur aut restituatur. Ubi matrimonia inter consanguineos proximiores inita frequentiora occurrunt, corrumpunt intima familiarum commercia, utpote cupidinem pravam ejusque suspicionem excitantia.

Dispensatio in banno nuptiali.

§ 82. Dispensatio ab omnibus tribus proclamationibus non nisi urgentissimis in casibus, a secunda vero et tertia proclamatione non nisi ex causis consideratu dignis et sufficienter probatis concedenda est.

§ 83. Quum contingere possit, ut instans mortis periculum dilationem longiorem impossibilem reddat, Episcopi in quovis districtu pro ratione locorum unum pluresve sacerdotes delegabunt, qui tali eveniente casu ipsorum nomine ab omnibus tribus proclamationibus dispensent.

§ 84. Si duae personae, quae conjugio se junctas falso asserunt et in loco domicilii passim pro conjugibus habentur, matrimonium inter se contrahere optant, dispensatio ab omnibus tribus proclamationibus ipsis absque gravissima causa deneganda non est. Sedulo tamen examinetur, an ipsas peraeque pro conjugibis haberi veritate undequaque nitatur.

§ 85. Nupturientes, quibus proclamationes penitus indulgentur, nunquam non tenentur, coram parocho, cui copulationem peragere competit, jurejurando firmare, quod ipsis nullum impedimentum conjunctioni suae obstans notum sit.

Supplices de dispensatione concedenda libelli.

§ 86. In libello supplici, quo dispensatio petitur, impedimentum cum omnibus adjunctis, a quibus ejusdem qualitas dependet, clare exponendum est; insuper rationum momenta, quibus petitio fulcitur, necessariis allegationibus instruantur. Episcopus de factis, quibus ejus decisio vel relatio Sanctae Sedi proponenda innitatur oportet, investigationes necessarias habebit.

Dispensatio pro foro conscientiae.

§ 87. Quodsi impedimentum occultum, nec ipsius propalatio prudenter timenda sit, ad conscientiae consulendum dispensatio suppresso conjugum nomine etiam per confessarium seu aliam idoneam personam peti ac impetrari potest.

Hujusmodi tamen dispensatio in foro externo nullatenus suffragatur: quocirca quando impedimentum praeter exspectationem publicum fieret, ne matrimonium coram judice humano in discrimen adducatur, dispensationem pro foro externo valituram servatis servandis petere oporteret.

Matrimonii convalidatio.

§ 88. Si copulatio forma debita peracta propter impedimentum matrimonio obstans invalida fuit, dispensatione obtenta matrimonii convalidatio institui debet.

§ 89. Dispensatione pro foro conscientiae tantum concessa ad matrimonium convalidandum sufficit, ut ambae partes consensum absque parocho et testibus renovent.

§ 90. Obtenta dispensatione, quae pro foro externo valet, consensus invalide copulatorum coram parocho, in cujus parochia domicilium habent, et duobus testibus renovetur oportet. Parochus nunquam non convalidationem peractam libro copulatorum inserere debet, quando autem conjunctio invalida in alia parochia eontracta fuerit, res hujus praeterea loci parocho communicanda est, ut ipse convalidationem peractam inscriptioni, quae de matrimonio invalido facta sit, diligenter adjungat.

§ 91. Proclamationes tali casu haud repetantur; copulatio a parocho privatim et coram fidis testibus peragatur. Exceptio fieri potest, quando impedimentum loco, quo convalidatio instituenda veniat, notorium sit.

§ 92. Impedimento absque dispensatione mutatione facti sublato, conjugibus injungendum est, ut consensus declarationem coram parocho et duobus testibus iterent, nisi forsan, quod nuptiarum celebratarum tempore impedimentum obtinuerit, et omnino occultum nec ullum rei probandae sit periculum: tunc enim concedi potest, ut consensum inter se renovent.

§ 93. Matrimonium, quod consensus fictus irritum reddit, consensu ab eo, qui ficte egerat, vere praestito convalidatum censeatur oportet. Idem obtinet de matrimonio, cui error seu vis metusque obstitit, quamprimum pars, quae errori aut violentiae injustae suberat, recognito errore aut libertate plene recuperata verbo factove assensum suppleverit. Nihilominus ad omne de consensu praestito dubium excludendum his quoque in casibus consultum est, ut conjuges consensum coram parocho et duobus testibus renovent: igitur hoc ut fiat, agendum erit, nisi obversetur prudens scandalorum vel matrimonii in discrimen abducendi metus.

Convalidationis effectus.

§ 94. Convalidatione peracta matrimonium quoad effectus civiles ita considerandum venit, ac si ab initio valide contractum esset. Idem de effectibus ecclesiasticis obtinet, quando vel una tantum pars nuptiarum celebratarum tempore ignorantia facti aut juris detenta fuerit. Alias ad dispensationis remedium confugiendum erit.

TITULUS SECUNDUS.

DE PROCESSU MATRIMONIALI.

Jurisdictio in caussis matrimonialibus.

§ 95. Caussae matrimoniales ad judicem ecclesiasticum spectant, cui soli competit, de validitate matrimonii et obligationibus ex eodem derivantibus sententiam ferre. De effectibus matrimonii mere civilibus potestas civilis judicat.

Judex competens.

§ 96. Conjuges in caussis matrimonialibus subsunt Episcopo, in cujus dioecesi maritus domicilium habet. Exceptioni locus est, si conjugale vitae consortium aut per separationem a thoro et mensa aut per desertionem malitiosam a marito patratam sublatum sit. Priori casu quaelibet pars jus adcusandi contra alteram ipsi competens coram Episcopo dioecesis, ubi haecce domicilium habet, exercere debet. Posteriori casu uxor apud Episcopum, intra cujus dioecesim domicilium ejus situm est, actionem instituere potest. Postquam eitatio judicialis intimata est, mutatio quoad conjugum domicilium facta mutationem respectu judicis competentis minime operatur.

Tribunalis matrimonialis membra.

§ 97. Episcopus in tractandis caussis matrimonialibus utitur tribunali, quoad ex praeside et consiliariis ad minimum quatuor constare debet. Nec tamen ultra sex consiliariorum numerus facile ascendat. Adjungatur eisdem secretarius nec non vir idoneus, qui aliquo tribunalis consiliario, ne munere fungatur, praepedito ejus locum teneat. Congruum erit, eundem ad sessiones, quibus ad supplendum necessarius haud est, qua assessorem absque suffragii jure admittere. Quando propter magnum dioecesis ambitum commode fieri haud possit, ut praeses negotiis juxta instructionis hujus tenorem ipsi incumbentibus solus fungatur, adjungatur eidem, qui vices ejus teneat.

§ 98. Episcopus membra tribunalis matrimonialis nominat, et, quando finis ratio exigere ipsi videatur, a collato munere vel suspendit vel removet. Viros seliget debitis dotibus praeditos, et quibus nulla ex parte exceptionis nota opponi possit.

§ 99. Caussas referendas, nisi Episcopus peculiare quid statuat, praeses consiliariis distribuit. Decisio majoritate suffragiorum absoluta fertur. Praeses mentem suam ultimus explicat et quando ipsius computato suffragio paria emergat vota, rem suffragio suo decernit, nisi de sententia super matrimonii validitate ferenda agatur, quo quidem in casu votis paribus existentibus nunquam non pro validitate standum erit. Si Episcopo visum fuerit, praesidi virum, qui vices ejus gerat, adjungere, de negotiis eidem assignandis necessaria constituet.

§ 100. Consiliarius tribunalis matrimonialis, cujus ea est ad partes relatio, ut testis suspectus vel et respective inhabilis foret, ista in caussa a functionibus suis exercendis abstinebit.

Instantiarum ordo.

§ 101. Appellatio ab Episcopo dioecesis ad Metropolitam provinciae ecclesiasticae, a Metropolita vero ad Sanctam dirigitur Sedem. Idem locum habet, quando res secundum legis ecclesiasticae tenorem ad quartam instantiam devolvi potest vel debet. Caussae, quas Metropolita vel Episcopus exemtus in prima instantia cognovit, in secunda quoque a Sede Apostolica judicantur.

Terminus appellationem annuntiandi et proponendi.

§ 102. Appellatio apud tribunal, contra cujus sententiam directa est, *intra decem a sententia communicata dies annuntianda venit;* tribunal vero intra triginta dies, qui pariter ab intimatione peracta computandi sunt, acta ad instantiam superiorem remittere debet. Pars appellans ea de re certior reddatur et commoneatur, quod intra triginta ab intimata hac injunctione dies gravamen ad judicem, apud quem appellatio secundum juris ordinem interponenda est, deferre teneatur. Supplicatio de longiori termino concedendo, tribunali, cujus sententia impugnatur, proponi debet; nec ei absque gravi causa annuendum est. Si pro rerum adjunctis necessarium sit, ad Sedem Sanctam preces de delegato nominando dirigere, tribunal, quamprimum de nominatione peracta notitiam ex officio nactum sit, ad actorum transmissionem absque ulla mora procedet.

I. Exceptio quoad judicis competentiam.

§ 103. Si conjuges vel nupturientes, qui in caussis matrimonialibus citantur, competentiam tribunalis impugnare posse autumant, eidem *intra decem post* citationem intimatam *dies* exceptiones suas exponere debent. Quando reclamatio pro non fundata declaretur, liberum eis est, ad instantiam proxime superiorem appellationem dirigere.

§ 104. Competentia, quam impugnarunt, per tribunal superius confirmata contendentes coram primae actionis judice caussam dicant, oportet.

II. Gravamina et investigationes super copulatione.

Copulationis denegatio.

§ 105. Parocho matrimonium contrahere cupientes vel repellente vel inducias adhibente, liberum ipsis est, curiam episcopalem adire, quae pro rei conditione aut obstacula removere sataget aut negotium tribunali matrimoniali perpendendum definiendumque transmittet.

§ 106. Quando difficultas in obmoto quodam impedimento dirimenti sit posita, tribunal matrimoniale perpensis individuis casus circumstantiis dijudicabit, an copulationis denegandae sufficiens adsit causa. Qua regulam tamen tenebit, melius esse, ut matrimonium valide contrahendum differatur, quam ut ansa praebeatur matrimonio invalido cum omnibus, quae ipsum concomitari assolent, malis. Depositio unius testis fide digni, nec non fama, qualis et graves cordatosque viros movet, nunquam non sufficit, ut nupturientes, usque dum res uberius dilucidata sit, repellantur.

Reclamatio ex titulo sponsalium.

§ 107. Si provocando ad sponsalia reclamatio instituatur, parochus casu, quo sponsalia invalida sint, partes ea de re edoceat; si autem valida censeat, litem amice componere conetur. Reclamatione immediate ad tribunal matrimoniale directa, nisi forsan invaliditas in propatulo sit, parocho ante omnia injungendum est, ut communitiones et consilia paterne adhibeat.

§ 108. Praesumtio stat pro libertate in conjugis electione: unde contra sponsalia pronuntiandum est, quoties de eorumdem validitate plene non constet.

§ 109. In eos, qui promissionem sponsalibus datam implere recusant, admonitione potius, quam coactione agendum est. Omnis pactio de poena conventionali, si a sponsalibus resiliretur, persolvenda non tantum illicita, sed etiam invalida est.

§ 110. Si judicium matrimoniale sponsalia irrita esse censeat, necessaria disponat, ut matrimonii celebratio ulterius haud retardetur.

§ 111. Declarata sponsalium validitate judicium matrimoniale per commissarium tentabit, partes ad amicam commovere compositionem. Damni compensationem quod attinet, id agatur, ut conventionem aequis sub conditionibus stipulentur. Super petitione unius saltem partis pecunia quoque compensationis loco solvenda statui potest. Quando actori non sufficiat, liberum quidem ipsi est, de damni compensatione judicium saeculare interpellare, verum reclamationis ab eo matrimonio oppositae ratio non amplius habeatur.

§ 112. Quando conventio de resiliendo a sponsalibus vel aequam compensationem praestando obtineri non posset, nuptiarum, adversus quas reclamatio instituta est, celebrationem admittere pro minori deberet reputari malo.

Investigationes copulationis eorum ergo, qui matrimonio se junctos esse falso praetendunt.

§ 113. Quodsi personae, quae matrimonio se junctas esse falso praetendunt, ordinariam ad matrimonium contrahendum viam ingredi non possint, quin sibi aut liberis suis gravia generent damna, rem aut ipsi aut per curatorem animarum ad tribunalis matrimonialis praesidem deferre possunt, qui investigationes ad abusum omnem excludendum necessarias habebit aut haberi curabit. De regula in negotio tractando duos tribunalis consiliarios adhibere debet; quando autem peculiaria rerum adjuncta strictissimum exigant secretum, Episcopus ei permittere potest, ut solus rem pertractet.

III. Nullitatis declaratio.

§ 114. Ecclesia, utpote fidei ac morum custos, matrimonii invigilat sanctitati ac vinculo indissolubili. Quodsi catholicus homo in conjunctione vivat, quae, cum impedimentum dirimens ei obstet, matrimonii nomen perperam usurpet, ipsa ad veri matrimonii dignitatem elevari aut, quando id fieri nequeat, invalida pronuntiari ac dirimi debet. Vicissim indissolubile matrimonii vinculum adversus omne ipsum sub invaliditatis praetextu dirimendi conamen magno vigore sustentari debet.

Matrimonium accusandi jus generale.

§ 115. Matrimonium impugnandi jus, in quantum haud expresse ad conjuges restringatur, competit catholico cuivis exceptis iis, qui sua hac in re commoda quaerere suspecti sint, vel quamvis matrimonium contrahendum esse sciverint ac proclamationes debito modo institutae essent, impedimentum absque legitima excusatione silentio presserint.

Matrimonium accusandi jus conjugibus privative competens.

§ 116. Propter errorem et coactionem injustam ea tantum pars, quae in errore versata aut cui consensus coactione injusta extortus est, matrimonium accusare potest. Jure suo excidit, quando, postquam errorem agnovisset aut metus, qualis ad matrimonium irritandum sufficiat, cessavisset, debitum conjugale voluntarie ac scienter praestiterit vel etiam, quin circumstantia ista probari possit, conjugale vitae consartium per sex meuses valuntarie continuaverit.

§ 117. Quando matrimonium sub conditione contrahere per exceptionem concedatur, matrimonium propter conditionem non impletam ab eo tantum conjuge accusari potest, qui neque in conditionem positum adesse falso asseveraverit aut, quod haud existat, dolo reticuerit neque, ne conditio impleatur, sua culpa impedierit. Renuntians conditioni accusandi jure se exuit.

§ 118. Propter impotentiam matrimonium consummandi, nisi notoria sit, conjuges tantum matrimonium accusare possunt.

§ 119. In valorem matrimonii, cui impedimentum impubertatis obstat, pubertate impleta super ejus tantum, qui matrimonii contracti tempore impuber fuerat, conjugis petitione inquirendum est.

Conjugum quoad matrimonium adcusandum juris restrictio.

§ 120. Propter impedimentum raptus raptor adversus matrimonium reclamare nequit. Rapta, quae raptui consensit, suo matrimonium adcusandi jure in exordio libertatis plene recuperatae utatur; alias non amplius audiatur.

§ 121. Impedimento ligaminis mutatione facti sublato, quando una pars, dum invalidas celebraret nuptias, impedimenti existentiam absque sua culpa ignoraverit, altera, quae impedimenti conscia fuerat, matrimonium adcusandi jure haud potitur.

Quatenus ex officio procedendum sit.

§ 122. Omnibus casibus et propter omnia impedimenta, quorum respectu jus accusandi conjugibus aut uni ipsorum haud privative competit, tribunal matrimoniale ex officio procedere debet, *quamprimum aut notorietate facti aut denuntiationibus aliove modo sufficiens suppeditet causa.*

§ 123. Tum quando matrimonium ab eo, cui de jure concessum est, adcusatur, tum quando inquisitio ex officio instituitur, matrimoniale tribunal nunquam non tenetur, cuncta, quae veritati perfectae investigandae inservire possunt, ex officio ordinare et executioni mandare.

Defensor matrimonii et obligationes ei incumbentes.

§ 124. Cujusvis est Episcopi, virum pietate et juris scientia insignem et quidem ex ecclesiastico, si fieri potest, coetu matrimonii defensorem constituere et, quando is munere suo fungi impediatur, virum necessariis dotibus instructum ad ejus locum tenendum nominare.

§ 125. Defensor matrimonii et in muneris ingressu et quoties matrimonii cujusdam valorem tuendum suscipit, jurare tenetur, se omnia, quae ad matrimonii vinculum servandum facere possunt, diligenter exploraturum et ad ipsum tuendum fideliter adhibiturum fore. Tribunalis matrimonialis ea de re sessionibus intersit. Ad partes audiendas, ad testium depositiones excipiendas et in genere ad omnes actus judiciales citetur oportet. Quivis actus judicialis, in quo aut ipse aut, quem Episcopus ad ejus locum tenendum nominaverit, praesens haud fuerit, qua invalidus et irritus censendus est.

Quomodo nullitatis declarandae petitio apud judicem proponenda.

§ 126. Matrimonii valorem impugnans accusationem, respective petitionem, ut nullitas pronuntietur, aut scripto expressam afferre aut in gesta redigenda viva voce exhibere potest. Facta, quibus assertio nullitatis supestruitur, distincte ac plene proponenda et probationes, quas praesto sibi esse autumat, indicandae sunt.

§ 127. Qui matrimonium scripto porrecto accusat, coram tribunali matrimoniali aut ejus commissario personaliter se sistere atque de scitu necessariis respondere debet; alias accusatio ab eo facta qua mera denuntiatio consideranda et tractanda erit.

Modus pertractandi denuntiationes de matrimonii impedimentis factas.

§ 128. Denuntiationes oretenus factae in acta redigantur; si scripto proponantur, curandum est, ut autor personaliter examinetur. Omnes ad eum dirigantur interrogationes, quae ad quaestionem facti in claram lucem vindicandam contribuere possunt.

§ 129. Denuntiationes scripto exhibitae, quarum autores personaliter examinari nequeunt, sub peculiaribus tantum rerum adjunctis pro sufficienti processus instituendi causa haberi possunt. Depositionibus tamen in iis contentis pro re nata utendum est ad ulteriores investigationes instituendas.

§ 130. Denuntiationes scripto factae, quarum autor nomen abscondit, per se sumtae nunquam sufficiunt, quae ansam praebeant ad inquirendum de matrimonii valore.

§ 131. Quodsi de obtinente quodam matrimonii impedimento fama divulgetur, quae omnibus perpensis circumstantiis attentionem meretur, tribunal matrimoniale circa fundamentum harum narrationum vel assertionum investiget atque dijudicet, an, quae eruantur, inquisitionem decerni postulent.

§ 132. Denuntiationum super impedimentis, propter quae conjugibus tantum jus accusandi competit, de regula nullatenus ratio habenda est: ubi autem ex allatis liquido constet, matrimonium aliquod propter ejusmodi impedimentum irritum esse, ex officio agendum est, ut vel convalidatio peragatur vel pars adcusandi jure pollens adversus matrimonium reclamet.

Conjuges reconciliandi experimentum a curatore animarum instituendum.

§ 133. Quodsi impedimentum in jus abductum tale sit, ut, quomodocunque res se habeat, consensus certe conjugis matrimonium accusantis ad ipsum removendum sufficiat, ordinario conjugum animarum curatori aut pro rerum et personarum conditione alii sacerdoti injungendum est, ut admonitionibus opportunis partem matrimonium impugnantem ad consensum renovandum inducat vel etiam pro re nata obtineat, ut consensus declaratio coram parocho et duobus testibus iteretur.

§ 134. Referat, cui negotium commissum est, ad tribunalis matrimonialis praesidem conaminum exitum, et quando conjux matrimonium impugnans consilio capto insistat, superaddat, quaecunque de factis, a quibus valor matrimonii accusati dependet, comperiri potuit.

§ 135. In quantum emergentibus impedimentis, quae conjugum consensu removeri nequeant, praevie cooperatio quaedam animarum curatoris disponenda veniat, a conditione casus et prudenti tribunalis matrimonialis judicio dependebit.

§ 136. Conjugum altero matrimonium adcusante, praeprimis inquirendum est, an forsan ea obtineant rerum adjuncta, ut, si actor unquam reclamandi jus habuerit, nunc certe temporis eodem exutus sit: quod quando extra dubium sit positum, actio haud admittatur.

§ 137. Ubi accusatio matrimonii facto innitatur, quod, licet verum undequaque esset, nihilominus aut absolute aut sub circumstantiis ab ipso actore expositis matrimonium irritando impar foret, accusatio absque ulteriori inquisitione repellenda est.

§ 138. Fieri potest, ut factum, cui adcusatio innititur, veritate quidem ejusdem supposita matrimonium irritaturum foret, attamen assertionis falsitas in propatulo sit. Tali casu actor de rei statu edocendus et, ut ab accusatione desistat, communendus est. Obsequium ipso detractante, nisi forsan, quae afferat, aperte inepta vel absurda sint, accusatio per conclusum a tribunali matrimoniali debita forma conditum rejiciatur oportet.

Quae agenda sint obmotis impedimentis § 80 memoratis.

§ 139. Quando impedimentorum, quae § 80 enumerantur, quoddam obmoveatur, tribunal matrimoniale inquisitionem in forma juris instituendam, quantum fieri possit, evitet. Plerisque casibus mediante clero parochiali obtineri poterit, ut dubia factum attinentia eliminentur. Impedimento per libros parochiales vel depositiones fide dignas comprobato, Episcopus dispensationem, qua opus est, tribuet curamque habebit, ut convalidatio omni scandalo diligenter semoto peragatur. Urgente periculo, ne conjuges vel alter eorum impedimento detecto ad consortium vitae dissolvendum abutantur, apud Sanctam Sedem de sanando matrimonium in radice supplicandum foret.

Commissarii ad inquirendum deputati nominatio.

§ 140. Quoties in valorem matrimonii alicujus inquirendum sit, tribunal matrimoniale commissarium ad quaestionem facti eruendam nominet.

Inquisitio praevia.

§ 141. Commissarius ad inquirendum deputatus, antequam ad probationes in forma juris instituendas procedatur, anniti debet, ut omnium circumstantiarum, quae ad matrimonii valorem vel nullitatem extra dubium ponendum facere possit, adcuratam acquirat notitiam. Hunc in finem pro conditione casus et personarum necessariae percunctationes faciendae; postea conjuges, personae matrimonium accusantes, vel quae impedimentum denuntiarunt, et in quantum fieri potest, etiam testes, qui pro matrimonio aut contra illud producuntur, defensore matrimonii praesente praeviae interrogandi sunt.

§ 142. Inquisitionis praeviae resultatum tribunali proponendum est matrimoniali, quod ordinationes dabit de iis, quae forsan adhuc necessaria ducat. Quo facto omnia disponenda sunt ad processum probatorium absque ulla cunctatione habendum.

Quod conjuges personaliter se exhibere debeant.

§ 143. Tam in praevia inquisitione, quam ad processum probatorium conjuges personaliter se sistere debent. Conceditur quidem, ut advocatos secum adducant, et antequam declarationem exhibeant, eorum consilium expetant; verum eae tantum declarationes, quas ipsimet pronuntiant, qua ipsorum mentem explicantes protocollo inserendae sunt. Quodsi advocatus proprio nomine quaedam casum matrimonialem attinentia deponat, haec ita excipienda et tractanda sunt, quomodo excipi et pertractari deberent, quando ipse haud qua advocatus comparuisset. Advocato negotium petrurbante commissarii est statuere, ut loco excedat.

Si non compareant, agenda.

§ 144. Si conjuges citati tribunal incompetens esse asseverent, ad normam §§ 103, 104 procedendum est.

§ 145. Conjugibus, qui citatione facta non comparent, aliam quam incompetentiae excusationem praetendentibus, de eadem vel admittenda vel rejicienda tribunal judicabit. Convenienti ex causa, ut terminus prolongetur, concedi potest. Si rationes adductae minus firmae inveniantur, vel quando quis nulla excusatione proposita comparere neglexerit, terminus eis pro domicilii distantia dimetiendus statuatur. Eo elapso a judicio saeculari, ut citatos ad comparendum adigat, petendum est. Casu, quo petitio ista ex qualicunque causa effectum haud sortiatur, procedura etiam absque citati praesentia inchoanda est.

Quatenus conjuges ope delegati examinari possint.

§ 146. Magna cura agendum est, ut conjuges ad quaestionem facti eruendam coram commissario ad inquirendum deputato personaliter compareant. Quando id praestiterint ac domicilium eorum a sede tribunalis matrimonialis longius distet, ipsis supplicantibus pro interrogationibus ulterioribus loco, quo habitant, aut non procul ab eo delegatus substitui potest. Defensor matrimonii jus quidem habet, ejusmodi interrogationibus semper et ubique adesse; petere tamen potest, ut pro iisdem, qui ejus locum teneat, constituatur. Hicce jurejurando promittere debet, se in interrogatione caussam ligaminis conjugalis, quam optime sciat ac possit, tuiturum esse; instructionesque ac notitiae forsan necessariae a defensore matrimonii ei communicandae sunt. Delegato non tantum interrogationes conjugibus proponendae transmittantur, sed de omnibus quoque instruatur circumstantiis quarum cognitio ad investigationem, prout expedit, dirigendam requiritur. Conjugibus in alia dioecesi commorantibus in finem interrogationum ulteriorum tribunal matrimoniale dioecesis illius, ut cooperari velit rogandum erit.

Probatio, quae requiritur.

§ 147. Praesumtio stat pro valore matrimonii; impedimentum plene probari debet.

Conjugum confessio.

§ 148. Confessio, quam conjuges in ipsa inquisitione faciunt, aut anteriori tempore, attamen post matrimonium, quod accusatur, jamjam contractum fecerunt, in quantum adversus matrimonii valorem pugnat, omni vi caret. Confessio, quam conjuges, antequam matrimonium accusatum contraxerant, deposuerunt, qua nullitatem probandi medium rejicienda haud est.

§ 149. Confessio conjugum, quae pro matrimonii valore militat, vim probandi in iis habet casibus, in quibus conjugibus adcusandi jus privative reservatur. Alias praesumtionem tantum generat.

§ 150. Quod conjuges aut alter eorum haud compareant, adversus matrimonii valorem nihil probare potest: unde eo probandi onus matrimonium accusanti incumbens diminui haud debet.

Testes.

§ 151. De testibus admittendis vel respuendis, de fide ipsis habenda et exceptionibus eisdem oppositis tribunal matrimoniale juxta generales juris canonici normas et peculiares, quos negotii natura postulat, respectus in singulis casibus judicabit.

Peculiares de testium credibilitate praescriptiones.

§ 152. Si conjux matrimonium accusans contra testem, qui suspectus, immo et respective inhabilis censendus est, exceptionem haud faciat, ipse ad testimonium pro matrimonio ferendum admitti potest. Verum quod conjuges contra testem aliquem haud excipiant, rationem nunquam suppeditat, depositionem ejus contra matrimonium directam pro fide digna ccipiendi.

§ 153. Relationes, quae praesumtionem fundant, testem pro uno aut contra unum conjugum partium studio agi, eas tantum depositiones suspectas reddunt, quae in commodum vel in praejudicium respectivi conjugis cedunt.

§ 154. Si testis ad utrumque conjugem tales habet relationes, quae praesumtionem partium studii eodem fere gradu generant, relationes hac per se sumtae haud sufficiunt, ut depositio, quae in commodum unius, sed in praejudicium alterius conjugis cedit, qua suspecta habeatur.

§ 155. Consanguinei conjugum a testimonio pro matrimonio aut contra illud ferendo tum tantum excludendi sunt, quando ex individua casus natura peculiares oriantur rationes, eos de partium studio suspectos habere.

§ 156. In dijudicanda credibilitate consanguineorum et omnium personarum, quarum ad conjuges relatio partium studii suspicionem inducit, imprimis considerandum est, an conjuges nullitatem matrimonii exoptent, necne.

§ 157. Omnes ii, de quibus supponendum est, quod circumstantiarum, quae in nullitatis quaestionem influxum exercent, bene gnari sint, etiam tunc audiri debent, quando qua testes repellendi forent, quia depositiones eorum praesumtiones stabilire ac viam ulterioribus recludere possunt dilucidationibus.

Exceptiones, quae testibus opponi possunt.

§ 158. Tam partes quam defensor matrimonii jus habent, testibus pro matrimonio aut contra illud productis exceptiones opponendi.

Quod testimonium personaliter ferendum sit.

§ 159. Testimonium personaliter ferendum est; scripta absentium testimonia probationem haud faciunt, sed praesumtionem tantum fundant.

Testium examen per delegatum instituendum.

§ 160. Si testium habitatio tantum distet, ut in sede tribunalis matrimonialis interrogari nequeant, secundum normas, quae § 146 de ulterioribus conjugum interrogationibus stabilitae sunt, procedendum erit.

Quomodo interrogationes concipiendae.

§ 161. Interrogationes testibus proponendas commissarius ad inquirendum deputatus concipit ratione habita omnium, quae in hucusque gestis emerserunt, nec non punctorum interrogatoriorum, quae a partibus forsitan exhibita sunt, et communicatis cum matrimonii defensore consiliis. Posterior jus habet, quae ipsi e re esse videntur, superaddendi vel et petendi, ut interrogationes tribunali matrimoniali adprobandae proponantur.

Jusjurandum testium.

§ 162. Jurati tantum testis depositio vim habet legitimae probationis. Testes, quos admittere nil impedit, antequam examinentur, tactis sacrosanctis Dei evangeliis jurare debent, se de interrogationum ad eos dirigendarum objecto veritatem, quo modo eam coram Deo et conscientia compertam habeant, plene ac intemerate, quin aliquid addant, omittant vel immutent, edicturos fore. Congrua de jurisjurandi sanctitate admonitio praemittatur.

§ 163. Ad jusjurandum a testibus praestandum conjuges ac, si matrimonium a tertio quodam accusetur, iste quoque, vocandi sunt. Attamen vocatorum absentia, quin jusjurandum excipiatur, impedire nequit.

Testium examen.

§ 164. Examen testium partibus remotis et singillatim instituendum est ac, antequam omnino terminatum sit, testium depositiones haud publicentur.

Quatenus testimoniis probandi vis competat.

§ 165. Quod a duobus testibus, quibus nulla exceptio in lege fundata opponi potest, distincte ac conformiter depositum est, in quantum haud alia testimonia fide digna aut circumstantiae, quae praesumtionem gravem stabiliant, refragentur, de regula plene probatum censeri debet. Verum quando de circumstantia agitur, a qua valor matrimonii dependet, minime sufficit, relationem vel factum, quo testium veracitas in dubium vocetur, evictum haud esse, sed oportet probatum sit, eos intemeratae probitatis et suppositioni, quasi perjurio conscientiam gravare possint, locum haud esse.

Investigatio per rei peritos.

§ 166. Quando ad probationem conficiendam rei periti adhibendi sint, eorum duos saltem et eos scientia et integritate praestantes omnique partium studio expertes tribunal matrimoniale seliget, qui juxta instructionem a commissario exarandam et a matrimonii defensore adprobandam investigationem debitam habeant et animi sententiam scriptis pandant. Relate ad partium studium contra rei peritos eaedem valent exceptiones, quae ipsis, si testes agerent, opponi possent.

§ 167. Rei periti jurati sint oportet. Ubi de facto agitur, a quo validitas matrimonii dependet, jusjurandum eis etiam tunc deferendum est, quando jam juramento in munere adeundo deposito se obstrinxerint, fore ut veritatem in consultis dandis sancte servent.

Probatio super genuinitate instrumentorum.

§ 168. Genuinitas instrumentorum, quae adversus matrimonii valorem pugnant, depositionibus conjugum aut talium personarum, quae qua testes aut suspectae aut inhabiles reputari deberent, probari nequit.

Jusjurandum conjugum.

§ 169. Jusjurandum a conjugibus praestitum aeque ac eorumdem confessio probationem de impedimento obtinente suppeditare aut supplere nequit.

§ 170. In quantum ad probandam circumstantiam, a qua jus matrimonium accusandi dependet, jusjurandum conjugis matrimonium accusantis admitti possit, tribunal matrimoniale de casu in casum perpendat et decernat.

§ 171. Si impedimenti natura prohibeat, ne ex officio procedatur, jusjurandum conjugis matrimonii valorem asserentis qua probatio pro matrimonio admitti potest

Praescriptiones peculiares de matrimonio, quod propter vim metumque impugnantur.

§ 172. Si conjux matrimonium ex injustae violentiae titulo accusat, ii, qui ex ejus assertione coactionem injustam exercuerunt, citandi et examinandi sunt. Adcusatione contra alterum conjugem directa, ejusdem confessione probatio stabiliri nequit. Quodsi parentes facta confitentur, ex quibus coactio injusta et matrimonium irritans resultaret, omnibus perpensis circumstantiis dijudicadum est, an forsan colludant cum prole conjugii solutionem desiderante? Ceterum in quantum accusatio haud alterum attineat conjugem juxta normas generales de probationibus in delictorum caussis valentes procedendum est.

De raptu.

§ 173. De rapta, quae cum raptore, dum in ejus potestate permaneret, matrimonium contraxit, praesumendum est, quod matrimonii ineundi causa rapta sit. Quodsi contrarium plene probatum fuerit, consistit nihilominus praesumtio, eam violentia injusta ad consentiendum adactam esse. Haec ipsa praesumtio adversus omne matrimonium militat, quod a quacunque persona quacunque ex causa rapta, antequam libertatem penitus recuperaverit, contractum fuerit.

De modo procedendi in impedimento impotentiae.

§ 174. Etiam, quando in matrimonium propter impedimentum impotentiae inquiratur, *normae de confessione et juramento conjugum propositae regulae ad* instar tenendae sunt. Si duo rei periti, in quorum scientia et animo a partium studio remoto tribunal matrimoniale plenam collocet fiduciam, unanimes declaraverint, impotentiam adesse insanabilem et absolutam ipsamque matrimonium praecessisse, hoc non obstante pars, cujus impotentia asseritur, petere potest, ut tertius quoque rei peritus investigationem habeat. Si impotentia pro respectiva tantum declaratur, conspirans trium saltem rei peritorum consultum ad probationem plenam necessario requiritur. Quodsi dubium remaneat, an impotentia insanabilis existat et matrimonium antecesserit, rejicienda est declarandae invaliditatis petitio.

§ 175. Exceptio locum habet, quando aut probatum sit, matrimonium nondum consummatum esse, aut nullitatis declarandae petitio intra tres a matrimonio contracto annos proponatur, simulque impotentiam adesse, non tantum ab utroque conjuge asseveretur, sed etiam a duobus rei peritis fide dignis qua valde verisimile astruatur. Tali casu conjuges consortium matrimoniale per tempus a tribunali constituendum, nunquam vero non tam diu continuare debent, donec in eo per triennium vixerint. Si elapso hoc tempore denuo petant, ut nullitatis sententia feratur, tribunal matrimoniale certius ante omnia se reddat, nil immutatum esse quoad facta, ex quibus impotentiam verisimilem et respective matrimonium nondum consummatum esse colligeretur. His peractis conjugibus permitti potest, ut impotentiam adesse jurejurando attestentur, et istud plenam probationem efficit.

Quaenam investigationibus terminatis agenda.

§ 176. Absoluto processu probatorio conjuges et quicunque matrimonium adcusaverit, nec non defensor matrimonii moneantur de eo, quo pollent jure, in hucusque acta animadvertendi. Exceptiones, si quas habeant, intra octiduum proponant. Ratione domicilii interesse habentium terminus protrahi potest; ita tamen, ut major, quam necessaria sit, mora non concedatur.

§ 177. Et tribunal matrimoniale et matrimonii defensor ex officio eas possunt ordinare investigationes, quae ad proceduram quoad probationes complendam necessariae ipsis videntur.

Sententia ferenda Episcopo est subjicienda.

§ 178. Antequam sententia feratur, tribunal matrimoniale ea, in quae decernenda consensit, Episcopo adjunctis rationum momentis subjiciet; qui quando sententiam ferendam haud sufficienter fundatam esse censeat, tribunali matrimoniali injunget, ut circumstantias ab ipso indicandas denuo mature perpendat et de consultationum resultato ad ipsum referat.

De iis quae ad sententiam definitivam requiruntur.

§ 179. Appellatio admittenda est, donec matrimonii validitas per duas aut ejus invaliditas per tres sententias conformes pronuntiata sit. Duabus sententiis pro matrimonio et duabus contra illud militantibus, matrimonium pro valido tenendum est.

Regulae de appellationibus.

§ 180. Prima instantia sententiam pro matrimonii validitate ferente, matrimonium accusans ad secundam instantiam appellare potest. Quodsi validitas in secunda instantia confirmetur, nulla amplius provocatio locum habet. Si matrimonium in secunda instantia pro invalido declaretur, matrimonii defensori incumbit, ex officio ad tertiam provocare instantiam. Si tertia instantia pro matrimonii valore judicat, ulterior haud obtinet appellatio. Quando autem contra valorem decernat, defensor matrimonii petere debet, ut quarta constituatur instantia, pro cujus sententia matrimonium vel validum vel invalidum reputetur oportet.

§ 181. Si prima instantia matrimonium invalidum declaret, matrimonii defensor ex officio appellare debet. Si secundae instantiae judicium pariter invaliditatem pronuntiet, defensor matrimonii, nisi prostantes invaliditatis probationes omne dubium secludant, causam ad tertiam instantiam deferre tenetur. Invaliditatis sententia per tertiam quoque instantiam lata, ulterior appellatio institui nequit. Si validitatem ea pronuntiet, actori liberum est, petere, ut quarta constituatur instantia, et hujus sententia qua finalis habenda est.

§ 182. Quando in prima et tertia instantia adversus matrimonium, in secunda autem pro eo sententia feratur, matrimonii incumbit defensori, quartam petere instantiam.

§ 183. Appellatio a defensore matrimonii interposita ex sua natura parti simul prodest, quae pro matrimonii validitate agit. Liberum nihilominus ipsi est, eamdem appellationem independenter a matrimonii defensore interponere; consultum tamen, ut cum eo hoc de negotio consilia conferat.

§ 184. Relate ad appellationes, quas interponere defensor matrimonii muneris sui ratione obligatur, nulli habentur dies fatales. Si intra terminum praescriptum appellationem haud annuntiet, judicium, a quo appellare debet, ipsum ad officium suum implendum compellat vel pro casus ratione etiam ad Episcopum ea de re referat et proponat, ut matrimonii defensio alii viro omni ex parte habili concredatur.

Modus procedendi in superiori instantia.

§ 185. Judex, qui in superiori instantia sententiam fert, non tantum in inferioribus instantiis gesta diligenter examinet, sed etiam omnia peragat, quae necessaria ducit, ut defectus suppleantur, dubia dilucidentur et errores corrigantur. Huc in finem conjuges examinare de instrumentis probandi ergo adhibitis investigationes instituere ac testes, a quibus novas informationes sperat, audire potest. Experimenta tamen per rei peritos facta tunc tantum iterari debent, quando indiciis praesumtionem gravem generantibus probabile reddatur, aut errorem aut partium studium intercessisse.

§ 186. Tam partes quam defensor matrimonii jus habent, in superiori instantia novas probationes afferendi.

Sententiae nullitas.

§ 187. Sententia nulla est, si a judice haud competente lata vel actus judicii essentialis aut prorsus omissus, aut, quin matrimonii defensor adhiberetur, institutus fuerit. Attamen valor sententiae a judice superiore latae ideo, quod inquisitionem ulteriorem habere necessarium haud duxerit, sed secundum allegata caussam deciderit, impugnari minime potest.

Procedura in caussa nullitatis.

§ 188. Nullitatis actio intra tempus appellationibus praefixum coram judice proxime superiori instituenda est.

§ 189. Quum conjuges exceptionem incompetentiae intra decem a citatione intimata dies proponere debeant [§ 103], jure carent sententiae latae nullitatis assertionem obgerendi; superior tamen judex sententiam propter competentiae defectum ex officio irritam declarare potest.

§ 190. Sententia de nullitatis actione lata appellationem haud admittit.

§ 191. Processus pro nullo declaratus coram eodem judice aut, quando ob competentiae defectum irritatus sit, coram judice, qui competens pronuntiatus, forma debita iterandus est.

Convalidationis adducendae tentamen.

§ 192. Quando matrimonium irritum esse, tribus conformibus sententiis decretum, impedimentum vero ejusmodi sit, ut renovatione consensus aut dispensatione indulta e medio tolli possit, Episcopus, nisi gravis causa contrarium suadeat, aget, ut matrimonium convalidetur.

Sententiae definitivae publicatio.

§ 193. Si natura impedimenti dispensationem excludat aut conamen, adducendi convalidationem, effectu careat, nullitatis declaratio partibus annuntianda est nec non prohibendae sunt, ne amplius sibi cohabitent.

Sententiae tenor et forma.

§ 194. Cuivis sententiae rationum, quibus innititur, momenta succinte, quin tamen essentiale quidpiam omittatur, adjugenda sunt. In sententia finali invaliditatem pronuntiante disertis declaretur verbis, ex parte prioris conjugii nullum novis ineundis nuptiis impedimentum superesse. Quaelibet sententia judicum et secretarii subscriptione nec non curiae episcopalis signo munienda est.

Sententiae notificatio et communicatio.

§ 195. Sententia partibus per apparitorem dimissa etiam copia notificatur; de quo peracto fides in scriptis facienda erit. Cujusvis sententiae de matrimonii valore latae Episcopus Gubernatorem provinciae certiorem reddet.

Sententiae definitivae effectus juridicus.

§ 196. Sententia de matrimonii valore dicta nunquam in rem judicatam abit. Si post temporis probetur, eam suppositione erronea niti, *caussa denuo in jus vocanda et forma debita pertractanda est.* Si contingat, ut sententia matrimonii nullitatem pronuntians retractetur, eo ipso matrimonia cuncta, quae conjuges intermedio forsan tempore inierunt, pro irritis declarata sunt.

§ 197. Excepto casu, de quo § 196 agit, inquisitio de matrimonii valore tum tantum, quando sententia primae instantiae irrita declaretur, *tamquam de novo iterum institui potest.*

Sententiae propter impotentiam latae effectus.

§ 198. Ille, cujus impotentiae pro absoluta et insanabili declaratae sententia nullitatis innititur, ad nuptias ineundas admitti nequit. Quando postea quomodocumque pateat, eum ad matrimonium consummandum aptum esse, redintegratur conjugium prius ab eo initum.

§ 199. Per se liquet, conjuges, antequam finalis nullitatis sententia lata sit, ad novum contrahendum matrimonium nullatenus admitti debere. Quamvis autem conjunctio ante sententiam finalem inita nunquam non illicita valde sit, immo iisdem ac polygamia poenis ecclesiasticis subjaceat, tamen, si processus, qui agitatur, nullitatis declaratione terminetur nec aliud quidpiam praepropere copulatis obstet impedimentum, pro vero reputari debet matrimonio.

Transactio et arbitrium.

§ 200. Caussae matrimoniales neque transactione neque sententia ab arbitris dicta terminari possunt. Conditiones, sub quibus tribunal matrimoniale jus habet, de litibus bona temporalia spectantibus arbitrii ope decernere, lege civili expressae sunt.

IV. Vinculi matrimonialis per professionem religiosam solutio.

§ 201. Quando conjux conqueratur, alterum consummationem matrimonii declinare, posterior vero declaret, quod saeculo renuntiare constituerit, perpendendum ante omnia venit, an matrimonium nondum esse consummatum extra dubium positum sit. Quo sufficienter probato, conjugi recusanti injungendum est, ut intra bimestre aut matrimonium consummet, aut religionem a Sacra Sede adprobatam ingrediatur. Ex gravi tamen causa terminus vel brevior vel longior praefigi potest.

§ 202. Si duorum conjugum, qui matrimonium haud consummasse asserunt, alter monasterium ingrediatur, quin alter reclamet; an veritate nitatur assertio de matrimonii consummatione nondum peracta, ad collusionis pericula devitanda eo districtius examinandum est.

§ 203. Postquam conjux, qui saeculo renuntiare vult, votis solemnibus se obstrinxit, alter parti instrumenti ope testandum est, matrimonii ab eo valide contracti, sed nondum consummati vinculum dissolutum esse, nec eum impediri, quin ad alia convolet vota.

§ 204. Tam nullitatis declaratio quam dissolutio vinculi matrimonialis per vota solemnia effecta in libro nuptiali annotanda est. Si matrimonium in loco, ubi neque sponsus neque sponsa domicilium habebat, contractum fuit, annotatio non tantum libro nuptiali parochiae, ubi matrimonium celebratum, sed etiam parochi, qui delegationem ad nuptiis assistendum dedit, inseri debet.

V. Separatio a thoro et mensa.

§ 205. Absque conjugali vitae consortio obligationes per matrimonium contractae impleri nequeunt: ipsum igitur in casibus tantum a lege ecelesiastica statutis et respective in forma a lege ecclesiastica praescripta solvere licet.

Separatio mutuo consensu facta.

§ 206. Conjuges mutuo consensu vitae consortium eum in finem solvere possunt, ut religionem a Sancta Sede approbatam ingrediantur vel ambo vel et una tantum pars, aut, ut vir ordines sacros suscipiat. An et quibus sub conditionibus altera pars in saeculo permanere possit, juxta legum ecclesiasticarum praescripta decerndum est.

Separatio perpetua adulterii ergo.

§ 207. Quodsi conjugum alter adulterii crimen commiserit, alteri jus competit perpetuam a thoro et mensa separationem petendi, nisi forsan adulterium approbaverit, permiserit vel sua culpa adduxerit, aut ipse quoque adulterii reum se reddiderit. Jure suo excidit, quodsi alteri parti culpam expresse vel tacite condonet.

Causae separationis temporalis decernendae.

§ 208. Conjuges ad vitae consortium eatenus tantum obligantur, quatenus id absque animae, vitae vel sanitatis periculo continuare possunt. Quodsi conjux a fide christiana deficiat, quodsi alteram partem ad defectionem a fide catholica, ad vitia vel crimina sollicet, quodsi injuriis realibus vel insidiis vitam ejus et sanitatem in periculum adducat, quodsi ei acerbiores animi afflictiones per longius tempus intentet, etiam, quando malo corporali diuturno contagiosoque laboret, alteri parti supplicatione proposita concedendum est, ut a thoro et mensa separetur, usquedum conjugale vitae consortium, quin periculum saluti suae aeternae vel temporali immineat, renovare possit.

§ 209. Conjux, quem altera pars malitiose deseruit, separationem a thoro et mensa petere potest, usque dum desertionis reus animum ad officia conjugalia adimplenda paratum sufficienter probaverit.

§ 210. Etiam propter tales officiorum transgressiones, quae juribus bona temporalia attinentibus vel honori civili alterius conjugis grave afferunt detrimentum aut urgens parant periculum, temporalis a thoro et mensa separatio pronuntiari potest.

Actio de separatione a thoro et mensa.

Reconciliationis procurandae tentamen.

§ 211. Conjux, qui separationem obtinere desiderat, ante omnia parochum adeat suum. Hic utramque partem vocabit et cuncta, quae lex Dei et foederis conjugalis dignitas suppeditat, motiva graviter simul et amanter adhibebit, ut conjugale vitae consortium intactum servetur. Si animos conciliare non valeat, secundo et tertio id ipsum, octiduo saltem quavis vice interposito, efficere conetur. Tertium tamen omitti potest experimentum, quando animorum exacerbatio successio spem adimat aut in patulo sit, actorem vitae consortium continuare non posse, qui aeternam aut temporalem salutem urgenti exponat periculo.

§ 212. Si reus comparere recusat, parochus jus habet, eum magistratus civilis interventu ad obedientiam praestandam compellere. An praesentia coactione obtenta finem juvare possit, secundum rerum adjuncta dijudicandum erit.

§ 213. Quodsi parochus frustra laboret, eo de negotio ad praesidem tribunalis matrimonialis referre et casu, quo conjuges bis tantum vocaverit, causam ex qua tertium experimentum omiserit, accurate exponere debet. Addat insuper, an et quatenus gravamina allata ipsi fundata videantur.

Commissariorum ad inquirendum deputatorum constitutio.

§ 214. Quivis Episcopus in remotioribus dioecesis suae partibus ecclesiasticos viros in commissarios nominabit, qui deputati sint ad inquirendum super actionibus separationem a mensa et thoro attinentibus, et secretarium ad protocollum excipiendum eis adjunget.

Quomodo separationis decernendae petitio apud judicem proponenda.

§ 215. Actor petitionem suam vel apud ipsum tribunal matrimoniale, vel apud commissarium, intra cujus districtum domicilium habet, aut scripto porrigere aut in acta redigenda oretenus exponere potest. Causam, ex qua jure se vitae communitatem tollendi pollere arbitratur, accurate exponere ac probationis praestandae media indicare debet. Edicendum praeterea tempus, cujus hucusque lapsu matrimonium duraverit et, quodsi liberi ex eo procreati sint, numerus eorum et aetas. An et in quantum conjuges separationem quoad thorum mensamque intendentes curiam episcopalem adire possint vel debeant, ab Episcopi ordinatione pendebit.

Decretum de inquisitione habenda.

§ 216. Separationis decernandae petitio tribunali proponatur matrimoniali, quod, nisi rationes aperte insufficientes sint, ad investigandum super negotio procedet. Quando res in tribunalis matrimonialis sede pertractetur, aliquis ex judicibus in id muneris qua commissarius deputetur.

Personalis conjugum praesentia.

§ 217. Inquisitionis ergo ambo conjuges personaliter comparere tenentur. Quoad advocatos et declarationes vel assertiones ab eisdem prolatas ad normam § 143 procedendum est.

Inquisitio praevia.

§ 218. Primo tentandum est, an negotium absque probationibus in rigore juris talibus terminari possit. Conjuges singuli examinari atque tum sibi invicem confrontari debent. Cuilibet parti assertiones alterius una post alteram ordine, quem successus temporis vel nexus inter causam et effectum indicat, proponendae sunt, et instandum, ut praecise respondeat. Si una pars ad instrumenta privata provocet, altera interroganda venit, an eadem genuina agnoscat? Testes quos partes nominaverint, in quantum adhiberi possint, examinandi ac, si necessarium videatur, sibi invicem nec non conjugibus confrontandi sunt.

§ 219. In hac praevia inquisitione qua testes tales quoque admittantur personae, quarum depositiones probationem judicialem fundare non possent, apud quas autem accurata factorum, de quibus quaestio versatur, notitia merito supponitur.

§ 220. Commissario ad inquirendum deputato competit, personas, quarum depositionibus quaestionem facti dilucidatum iri sperat, etiam, quin partes qua testes eas designaverint, interrogare. An conjugibus confrontari debeant, prudenti ejusdem judicio relinquitur.

Post praeviam inquisitionem ordinanda.

§ 221. Protocollum de inquisitione praevia exceptum tribunali matrimoniali proponendum est, et quando, ad quae actor provocet, per confessionem rei vel per instrumenta, quae omnem exceptionem excludant, extra dubium jam posita sint, tribunal matrimoniale ad sententiam ferendam procedere debet. Casu opposito processus probatorius instituendus est.

§ 222. Reo, si postulet, petitionis ab actore scripto propositae vel actorum, in quae oretenus facta redacta sit, copia dimittenda et terminus statuendus, intra quem responsionem vel scripto offerat vel in acta redigendam viva voce exhibeat. Alias separationis pronuntiandae petitio ipsi praelegatur et quae ad se et conjugale vitae commercium tuendum afferat, in acta redigantur.

Processus probatorius.

Testes.

§ 223. Admittendi sunt testes, quibus ea, contra quam deponunt, pars exceptiones haud obgerit, etsi aliunde qua suspecti vel inhabiles repelli deberent.

§ 224. Quando domicilium testium ab inquisitionis loco notabiliter distet, ad eorum examen loco, quo facilius se conferre possint, instituendum vir, quantum fieri possit, ecclesiasticus deputandus est. Quodsi extra dioecesis limites habitent, agendum cum Episcopo, cui subsunt, ut de eorum depositionibus excipiendis, quae oportet, constituat. Testes, qui propre tribunalis matrimonialis sedem habitant, nunquam non apud tribunal matrimoniale examinandi sunt.

§ 225. Quaestiones concipit commissarius ad inquisitionem deputatus ratione habita punctorum interrogatoriorum, quae partes forsan obtulerunt. Quoad jusjurandum testium observentur normae § 162 statutae.

§ 226. Ad juramentum a testibus deponendum partes vocari debent; attamen quod non compareant, haud impedit, quominus jusjurandum excipiatur. Partibus non licet examini testium adesse, atque depositiones, antequam examen terminatum sit, publicari haud debent.

Inquisitio per rei peritos instituenda.

§ 227. Rei periti, quorum consultum necessarium forsan sit, a commissario ad inquirendum deputato seligendi sunt; de exceptionibus eis oppositis tribunal matrimoniale decernit. Jusjurandum a rei peritis exigi debet, nisi juramento in munere adeundo deposito se ad veritatem in consultis dandis sancte servandum obstrinxerint.

Probatio plena per testes aut rei peritos efficienda.

§ 228. Per depositionem conformem duorum testium juratorum et fide undequaque dignorum, vel per consultum conforme duorum rei peritorum, qui scientiae jam documenta praestiterint et a partium studio alieni sint, ac respective jurati, factum, circa quod depositio vel consultum versatur, plene probatur.

Adulterium probandi modus.

§ 229. Ut adulterium in finem separationis a mensa et thoro probetur, sufficiunt praesumtiones violentae. Facta vero, quibus praesumtiones hae innituntur, juxta normas processum in delictorum caussis attinentes probanda veniunt.

Communicatio ad partes dirigenda.

§ 230. Protocollum examinis testium partibus vel praelegendum vel scripto communicandum est; si consultum a rei peritis datum fuerit, de hujus pariter tenore instruendae sunt.

Finale conjugum examen.

§ 231. His peractis ambo conjuges commoneri debent, ut de testium depositionibus vel rei peritorum consultis sensus suos exponant. Si nova instrumenta, vel de instrumentis, quae in inquisitione praevia dubiis obnoxia remanebant, novas probationes afferant, pars adversaria hac de re audienda est.

Rei confessio.

§ 232. Confessio conjugis, contra quem separationis actio intentatur, plenam efficit probationem.

Quatenus conjugum juramentum admitti possit.

§ 233. An juramentum suppletorium ex parte conjugum concedendum, an juramentum litis decisivum uni eorum imponendum vel permittendum sit, a tribunali decerni debet; quo in negotio ante oculos habendum est, in genere jusjurandum partium tunc tantum admitti posse, si omne aliud veritatem eruendi medium defecerit, et animorum exacerbationem, qualis in conjugum litibus obtinere solet, perjurii augere periculum.

Reo non comparente agenda.

§ 234. Si conjux in jus vocatus citatione facta non compareat, juxta normam § 145 statutam procedendum est.

§ 235. Quando actio propter desertionem malitiosam instituatur, absenti in prima statim citatione praefigatur terminus, in quo dimetiendo distantiae atque mediorum communicationis ratio prudenter habeatur. Quodsi, ubi commoretur, ignotum sit, per ephemerides publicas citari debet termino praefixo, quem tribunal matrimoniale omnibus perpensis circumstantiis constituerit.

Quatenus actoris sustentationi providendum.

§ 236. Quodsi actor asserat, se conjugale vitae consortium continuare non posse, quin salutem animae vel vitam et sanitatem magno exponat periculo, atque casu, quo separatio legitime pronuntiata foret, reo obligatio incumbat, alteri conjugi honestam procurare sustentationem, tribunal matrimoniale perpendere debet, an sufficientes praeviae ordinationis causae prostent, quas si haberi judicatum sit, a judice saeculari petendum est, ut actori habitationem separatam et sustentationem honestam rei impensis praevie assignet.

Quatenus sententia Episcopo subjicienda.

§ 237. Episcopus, si pro casus natura necessarium duxerit, ordinabit, ut, antequam sententia feratur, tribunal matrimoniale, quae decernenda censeat, ipsi proponat (§ 178).

Quaenam in sententia exponi debeant.

§ 238. Quavis sententia separationem pronuntiante exprimendum est, an causa separationis, quatenus culpa ei insit, uni tantum vel ambabus partibus imputari debeat. Quodsi ex peractis eluceat, patrem vel matrem propter defectus morales non eos esse, qui jus educationis iis competens in liberorum salutem exercere possint, istud quoque in sententia exprimatur.

Appellationes in caussa separationis.

§ 239. A decisione tribunalis matrimonialis conjux, qui ea se gravatum arbitretur, ad secundum instantiam provocare potest. Duabus sententiis conformibus latis ulteriori appellationi locus haud superest.

§ 240. Sententia de separatione a thoro et mensa pronuntiata nulla est, si a judice non competente lata vel actus judicii essentialis omissus fuerit. Caussa nullitatis secundum normas §§ 187, 188 stabilitas pertractanda venit.

Quorumnam ratio habenda.

§ 241. Quod conjuges in vitae consortium solvendum consenserint, legitimam separationis decernendae causam non subministrat. Attamen formalitates praeter absolute necessarias cunctae eo magis vitandae sunt, quod actibus judicialibus animorum exacerbatio augeri et reconciliatio difficilior reddi soleat. Insuper famae partium et familiarum suarum, quantum finis ratio permittit, consulatur oportet.

Modus separationis caussam tractandi, si rei confessio jam prostet.

§ 242. Quando una pars ad facta provocet, quae legitimam separationis postulandae causam constituunt, et altera rem ita se habere haud neget, parochus animos sibi conciliare ter tentare debet. Conaminibus ejus effectu frustratis apud commissarium ad inquisitionem deputatum de accusatione et confessione excipiatur protocollum et res tribunali matrimoniali ad decernendum propanatur.

Procedura extraordinaria.

§ 243. Quodsi facta a reo non negentur, et ut famae partium parcatur, vel ex alia gravi ratione necessarium videatur, ut negotium quam secretissime pertractetur, partes immediate tribunalis matrimonialis praesidem accedere possunt. Postquam iste compertum habuerit, legitimam adesse separationis causam, parochum vel pro re nata etiam alium sacerdotem admonitione trina concordiae restituendae experimentum facere jubeat, effectu haud subsecuto duobus tribunalis consiliariis adhibitis separationem pronuntiet. Tali casu, utraque parte petente, causa separationis in sententiae tenore silentio premi potest. Haec tamen ipsorum supplicatio protocollo de actu excipiendo inseri debet.

Observanda circa ea, quae bona tamporalia attinent.

§ 244. Quoad postulationes et lites circa bona temporalia versantes, quae ex sententia in caussa quadam matrimoniali lata oriuntur, partes ad judicium saeculare remittendae sunt. Si ambae unanimes petant, ut ea de re a tribunali matrimoniali arbitrii modo decernatur, injungendum ipsis est, ut de transactione, qua in hanc petitionem conspiraverint, instrumentum proponant. Minorennis admoneatur, quod ad transactionis hujus valorem patris vel tutoris consensus requiratur. Ceterum in arbitrio dando leges Austriacae qua norma teneantur.

§ 245. Quando uxor de invaliditate vel separatione actionem instituens petat, ut marito administratio bonorum suorum adimatur, aut ut ipse ad cautionem dandam pro bonis suis, quae ejus in manibus versantur, adigatur, ad saeculare judicium remitti debet.

VI. Secundae nuptiae vi declarationis de conjugis morte editae contrahendae.

§ 246. Quum sanctum et inviolabile sit conjugii vinculum, ad secundas nuptias nemo admitti potest, nisi de conjugis morte probationes afferat, quae omne prudens dubium penitus excludant. Ea, quae ad moralem mortis certitudinem stabiliendam tendunt, summa cum cautione pertractanda, verum haud absolute rejicienda sunt. Fieri potest, ut ex rerum adjunctis plene probatis moralis oriatur certitudo, conjugem in vivis haud amplius agere, licet desint documenta vel testium depositiones mortem subsecutam jam esse confirmantes. Quodsi absentis cujusdam conjux talia afferat, quae rarissimum hunc casum adesse valde probabile reddant, commonendus est, ut praevie civilem adeat magistratum, cui ampliora suppeditant factum explorandi media et cujus est, mortis declarationem quoad effectus civiles edere.

§ 247. Quamprimum superius provinciae judicium peracta communicaverit, tribunal matrimoniale praesente matrimonii defensore dijudicabit, an conjux, cujus fata ignorantur, eo cum effectu, ut alteri parti ad novas transire nuptias liceat, mortuus censeri possit. Decisio ferenda nunquam non Episcopi judicio subjicienda est.

§ 248. Quoties tribunal matrimoniale certitudinis moralis, ad quam provocatur, fundamentum haud ita firmum esse judicet, ut ligamen conjugale morte solutum esse absque haesitatione teneri possit, mortis declarationi enuntiandae assensum denegabit et rationum, quibus commovetur, momenta judicio civili communicabit. Quodsi secunda et tertia instantia ecclesiastica oppositam sententiam amplectantur ac eisdem assensum praebentibus supremum tribunal civile mortis declarationem pronuntiet, novis contrahendis nuptiis nullum obgeratur impedimentum.

§ 249. Quando tribunal matrimoniale censeat, nil novis ineundis nuptiis obesse, hos quidem sensus suos judicio provinciae superiori significet, ad conjugem tamen nullam dirigat communicationem, antequam mortis declaratio relate ad effectus civiles firma consistat.

§ 250. Si ad novas transitur nuptias, parochus tam mortis declarationem a magistratu civili editam quam decisionem tribunalis matrimonialis, respective assensum, quem superior instantia ecclesiastica praebuit, in libro nuptiali annotare debet.

§ 251. Quodsi casus occurrat, cui in instructione hac provisum haud sit, ad juris communis normam pertractetur et decidatur oportet.

Praesentem Instructionem, quam Celsissimus et Reverendissimus Princeps Archiepiscopus Vindobonensis Joseph Othmarus Rauscher exaravit, pro singulari, qua praestat, modestia nobis exhibuit, ut privatum nostrum de ea judicium aperiremus. Hujusmodi benignitati respondere cupientes, diligentiori quo valuimus examini opus subjecimus, et pro rei veritate declaramus, nihil in eo nos invenisse, quod vel Sacrorum Canonum praescripto, vel Apostolicarum Constitutionum ordinationibus, vel probatorum Doctorum sententiis conforme non sit. Quamobrem Opus summo labore ac sapientia elucubratum, merito futurum confidimus, ut in vastissimis Imperii Austriaci regionibus, ubi in usum fuerit inductum, sacrae aeque ac civili Reipublicae benevertat.

Romae, die quarta Maii Anni 1855.

Aloisius Tomassetti S. Theologiae, et Juris utriusque Doctor.
Hannibal Capalti S. Theologiae, et Juris utriusque Doctor.
Petrus Beks Praep. Gen^{lis} Societatis Jesu.
Laurentius Valenzi S. Th. et J. U. Dr.
Laurentius Nina J. U. Dr.

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